Supreme Court, U.S.
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No. 92-896

In the Supreme Court of the United States

OCTOBER TERM, 1993

THUNDER BASIN COAL COMPANY, PETITIONER

v.

ROBERT B. REICH, SECRETARY OF LABOR, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the district court lacked authority to entertain petitioner's challenge to the anticipated enforcement of a regulation promulgated pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.* (1988 & Supp. III 1991), in light of that Act's comprehensive procedures for administrative and judicial review, under which review of enforcement decisions lies in the courts of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 969 F.2d 970. The orders of the district court (Pet. App. 19-30) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1992. A petition for rehearing was denied on August 28, 1992. Pet. App. 17-18. The petition for a writ of certiorari was filed on November 24, 1992, and was granted on March 8, 1993. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.* (1988 & Supp. III 1991), are reproduced in the Appendix, *infra*.

STATEMENT

1. a. Congress enacted the Federal Mine Safety and Health Act of 1977 (Mine Safety Act), 30 U.S.C. 801 *et seq.* (1988 & Supp. III 1991), to "protect the health and safety of the Nation's coal [and] other miners." 30 U.S.C. 801(g). The Secretary of Labor is charged with enforcing the Act through the Mine Safety and Health Administration (MSHA), an entity established by Congress within the Department of Labor. 29 U.S.C. 557a.

When enacted in 1977, the Mine Safety Act carried forward on an interim basis various health and safety standards that had been adopted under prior law. See 30 U.S.C. 841-846, 861-878. The Act also authorized the Secretary to promulgate, by rule, "improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines." 30 U.S.C. 811(a). Any person who may be aggrieved by a mandatory health or safety standard promulgated by the Secretary under that authority may seek judicial review of the standard in the United States Court of Appeals for the District of Columbia Circuit or the circuit in which the person resides or has his principal place of business. 30 U.S.C. 811(d).

b. Under the Mine Safety Act's enforcement scheme, the Secretary of Labor or his representatives are authorized to conduct safety inspections of mines. 30 U.S.C. 813(a). The Act affords miners the right to have a "representative authorized by [the] miners" accompany safety inspectors, for the purpose of "aiding" inspections and "to participate in pre- or post-inspection conferences held at the mine." 30 U.S.C. 813(f). The Act also requires operators to provide miners' representatives with

access to records concerning employee exposure to "potentially toxic materials or harmful physical agents" that are subject to statutory health or safety standards. 30 U.S.C. 813(c).[1]

Pursuant to rulemaking power conferred by 30 U.S.C. 813(f), MSHA promulgated regulations in 1978 governing the selection of miners' representatives. See 30 C.F.R. Pt. 40, as adopted in 43 Fed. Reg. 29,509 (1978). Those regulations define a "representative of miners" as "[a]ny person or organization which represents two or more miners at a coal or other mine for the purposes of the Act." 30 C.F.R. 40.1(b)(1). A representative must file certain information with MSHA concerning his or her identity and designation, and must provide a copy of that information to the mine operator. 30 C.F.R. 40.2, 40.3. The operator must, in turn, post that information at the mine. 30 C.F.R. 40.4.

c. If the Secretary determines that there has been a violation of the Act or implementing health and safety standards, rules, or orders, the Act requires the Secretary to issue a citation to the mine operator. The citation must specify a reasonable time for abatement of the violation. 30 U.S.C. 814(a). The Secretary must also propose the assessment of a civil penalty of up to $50,000

[1] The court of appeals described the functions of representatives as follows (Pet. App. 3):

> A miner representative has the right to accompany the MSHA inspector on such inspections and the right to obtain an immediate inspection of the mine by MSHA if the representative has "reasonable grounds to believe that a violation of [the Mine Act] or a mandatory health or safety standard exists, or an imminent danger exists." [30 U.S.C.] 813(g)(1). The miner representative also enjoys other rights under the Mine Act. *See* [30 U.S.C.] 819(b) (representative receives "copy of any order, citation, notice, or decision required by [the Mine Act]"); [30 U.S.C.] 815(d), 817(e) (may contest issuance, modification, or termination of an order); [30 U.S.C.] 813(f) (representative may participate in pre- or post-inspection conferences).

for the cited violation. See 30 U.S.C. 815(a), 820(a) (Supp. III 1991). An operator that receives a citation but fails to correct the violation within the specified abatement period may be assessed additional civil penalties of up to $5,000 for each day the violation remains uncorrected. 30 U.S.C. 820(b) (Supp. III 1991).[2]

A mine operator may seek review of a citation or proposed assessment of a civil penalty by the Federal Mine Safety and Health Review Commission, an adjudicatory agency independent of the Department of Labor. See 30 U.S.C. 815(d), 823. The operator must notify the Secretary within 30 days of receipt of the citation or proposed penalty whether it wishes to seek such review. If it fails to do so, the Secretary's notification of the citation or proposed assessment of penalty "shall be deemed a final order of the Commission," and it is "not subject to review by any court or agency." 30 U.S.C. 815(a).

If the operator elects to seek review by the Commission, the first level of review is in the form of a hearing before an administrative law judge (ALJ). The ALJ "shall make a decision which constitutes his final disposition of the proceedings." 30 U.S.C. 823(d)(1). Thereafter, any party "adversely affected or aggrieved" by the ALJ's decision may seek discretionary review by the Commission. 30 U.S.C. 823(d)(2)(A)(i).[3] Commission review may be sought on the ground that the ALJ's factual findings are not supported by substantial evidence, that the decision is contrary to law or regulations, that a prejudicial error of procedure was committed, or that a

[2] In Section 102 of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, Tit. III, 104 Stat. 1388-29, the maximum penalty under 30 U.S.C. 820(a) was increased from $10,000 to $50,000, and the maximum daily penalty under 30 U.S.C. 820(b) for a failure to abate was increased from $1,000 to $5,000.

[3] The Commission may also grant review of an ALJ decision on its own motion. 30 U.S.C. 823(d)(1), 823(d)(2)(B).

"substantial question of law, policy or discretion is involved." 30 U.S.C. 823(d)(2)(A)(ii). If the Commission does not grant review within 30 days of the ALJ's decision, that decision "shall become the final decision of the Commission." 30 U.S.C. 823(d)(1).[4]

Any person "adversely affected or aggrieved" by an order of the Commission "may obtain * * * review * * * in any United States court of appeals for the circuit in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit." 30 U.S.C. 816(a)(1). A petition for review must be filed within 30 days following issuance of the order. *Ibid.* The court of appeals has the power to affirm, modify, or set aside the Commission's order, in whole or in part, and to enforce the order to the extent it is affirmed or modified. The court also may remand to the Commission for the receipt of additional evidence. *Ibid.*

2. a. Petitioner operates a coal mine near Wright, Wyoming. J.A. 8. In October 1990, some miners working at petitioner's mine designated two employees of the United Mine Workers of America (UMWA), who did not work at the mine, as their representatives for purposes of the Mine Safety Act, including exercise of their "walk-around rights"—*i.e.*, accompanying MSHA officials on inspections. J.A. 11-12, 21-23; see also J.A. 25-26, 29-30; Pet. App. 3-4. In 1987, the employees at petitioner's mine had rejected the UMWA as their collective bargaining representative under the National Labor Relations Act (NLRA), 29 U.S.C. 151-169. Pet. App. 25.

[4] In determining the amount of a civil penalty to be assessed for a violation of the Act, the Commission and its ALJs must consider the operator's history of previous violations, the appropriateness of the penalty to the size of the operator's business, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. 820(i).

On November 29, 1990, petitioner informed MSHA by letter that it had received notice from the UMWA of the designation of two UMWA employees as miners' representatives, but that it was returning that notice to MSHA because petitioner believed it was invalid in two respects. J.A. 31-33. First, petitioner relied on the fact that its employees had rejected the UMWA as their collective bargaining representative under the NLRA in the 1987 election. Petitioner pointed out that in *Utah Power & Light Co.* v. *Secretary of Labor*, 897 F.2d 447 (10th Cir. 1990), the Tenth Circuit had rejected a mine operator's contention that miners' representatives under the Mine Safety Act must be employees at the mine in question, and had stated that if the Act's provisions for designating miners' representatives are misused, "the solution is for the operator to take action against individual instances of abuse when it discovers them." J.A. 32 (quoting 897 F.2d at 452). Expressing its belief that the UMWA was misusing the designation of miners' representatives under 30 C.F.R. Pt. 40 in this case to assist in its organizing efforts, petitioner urged MSHA to make an inquiry and ensure that any designation of non-employees under 30 C.F.R. Pt. 40 is done in a manner that does not contravene the Tenth Circuit's holding in *Utah Power & Light* before it takes any action to enforce the purported designation. J.A. 32. Second, petitioner contended that the notice contained certain "technical" deficiencies. J.A. 33.

Following intervening discussions, the district manager of MSHA responded to petitioner's concerns in a letter dated March 11, 1991. J.A. 49-50. Citing *Utah Power & Light*, the district manager stated that it was "well-established" that walk-around rights under 30 U.S.C. 813(f) "extend[] to miners' representatives who are *not* employees of the mine operator." J.A. 49. The district manager further stated that MSHA had taken the position in prior court and Commission cases that a miners' representative could not be denied access to a mine based

on the operator's "general belief" that the representative will use his access for union organizing purposes. *Ibid.* The district manager then elaborated. (J.A. 49-50):

> It is clear that the right of the miners' representative, to participate under [30 U.S.C. 813(f)], is not an uncontrolled access right to the mine property to engage in any activity that the miners' representative wants. The right is one limited to travel and participate with the MSHA inspector in the safety and health inspection of the mine. The MSHA inspector controls the inspection, and it is the inspector's responsibility to ensure that the miners' representative [*sic*] activities are limited to aiding the inspection and not to engage in other unrelated activities.

Finally, the district manager informed petitioner that MSHA had received a revised designation of representatives that corrected the technical errors petitioner had identified, and that it is the operator's responsibility "to post the information" once it is received from the miners' representative. J.A. 50. The letter did not mention the possibility of a citation or civil penalty assessment for failure to post the notice.

b. On March 11, 1991, before it received the letter from the MSHA district manager, petitioner filed this suit for injunctive and declaratory relief in the United States District Court for the District of Wyoming. J.A. 6-20. The complaint predicted that, if petitioner did not post the notice—or if petitioner posted the notice but later refused to honor it (by not allowing a UMWA representative to accompany a MSHA inspector)—"MSHA will require [petitioner] to immediately comply with MSHA's interpretation." J.A. 13. That action, the complaint continued, would force petitioner either to accept a citation and risk incurring penalties for failure to comply with the Mine Safety Act, or to acquiesce in MSHA's position that UMWA employees can represent petitioner's employees for Mine Safety Act purposes (notwithstanding the 1987 election under the NLRA), thereby

"waiving" petitioner's rights under the NLRA. J.A. 13-14, 15. Petitioner alleged that to force it to choose between those options, without a prior hearing on the asserted conflict between the Mine Safety Act and the NLRA, would violate petitioner's due process rights. J.A. 16.

3. On March 21, 1991, the district court entered a preliminary injunction barring respondents from enforcing 30 C.F.R. Pt. 40 against petitioner until further order of the court. Pet. App. 24-30. Purporting to apply traditional criteria governing issuance of a preliminary injunction, the court noted that petitioner "[did] not claim it will succeed on the merits," but rather had "rais[ed] serious questions going to the merits" because of what the court termed the "difficult question" of how petitioner is to act given the purported "conflict between the [NLRA] and the regulations promulgated under [the Mine Safety Act.]." *Id.* at 27. The court also concluded that petitioner would suffer irreparable harm because of "potential abuse" of the Act's representation provisions by UMWA employees and petitioner's exposure to penalties if it failed to comply with the regulations. *Id.* at 28.

Subsequently, the district court denied respondents' motion to dismiss for lack of subject matter jurisdiction and failure to exhaust administrative remedies. Pet. App. 19-23. The court sought to distinguish the Tenth Circuit's decision in *American Coal Co.* v. *United States Dep't of Labor*, 639 F.2d 659 (1981), which held that district courts lack jurisdiction to resolve disputes under the Mine Safety Act, on the ground that *American Coal* "only involved a violation or interpretation of a [Mine Safety Act] regulation," whereas this case raised a "statutory conflict, and the allegation of a constitutional violation." Pet. App. 20-21. The district court also held that petitioner did not have to exhaust its administrative remedies under the Mine Safety Act, because the Commission does not have the expertise to resolve a conflict between

the Mine Safety Act and the NLRA and because petitioner contended that resolution of that conflict through standard MSHA procedures would violate petitioner's due process rights. *Id.* at 21, 22.

4. The court of appeals vacated the preliminary injunction and remanded with instructions to dismiss the action for lack of jurisdiction. Pet. App. 1-16. The court reasoned that "[w]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Id.* at 5 (quoting *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 345 (1984)). After analyzing those factors with respect to the Mine Safety Act, the court adhered to its holding in *American Coal* that the Act's preclusion of district court review can be fairly discerned from the comprehensiveness of the procedures established by the Act and the limited retention of district court jurisdiction over certain actions brought by the Secretary under 30 U.S.C. 818 and 820 (1988 & Supp. III 1991). Pet. App. 5-8. The court therefore held that "actions taken under the Act should be challenged initially before the administrative agency in accordance with the administrative review procedures outlined in 30 U.S.C. § 816." Pet. App. 7.

Although the court of appeals believed that it "need not go beyond the precedent of *American Coal* and the language of the Act," Pet. App. 9, it concluded that the legislative history of the Act also supports the conclusion that the district court had no authority to resolve the dispute. The court explained that under the predecessor to the Mine Safety Act, penalty assessments were subject to challenge in district court, but that Congress had changed that regime to provide for exclusive judicial review in the courts of appeals. Congress did that in order to permit more timely correction of safety and

health hazards and to induce compliance with the law by mine operators. Pet. App. 9-10 (citing S. Rep. No. 181, 95th Cong., 1st Sess. 8 (1977)); Pet. App. 10 & n.4 (citing S. Rep. No. 181, *supra*, at 16, 40).

The court of appeals next concluded that nothing about the nature of petitioner's claims required an exception to that procedure here. It noted that "the Mine Act * * * does not limit the bases upon which a party may challenge a citation, order or proposed assessment," and does not "distinguish between challenges to orders based on constitutional grounds or conflict with other statutes and challenges based on misapplication of the Act itself." Pet. App. 8. In fact, the court pointed out, the Commission is able to, and routinely does, consider constitutional issues. *Id.* at 8-9. In any event, the court held, the availability of review in the court of appeals is "adequate to address both constitutional challenges and questions of conflict with other statutes." *Id.* at 9.

Finally, the court of appeals held that the statutory review procedures sufficiently protect petitioner's interests. Pet. App. 11-15. Because the Act does not require a party to pay any penalties until the administrative and judicial review process is complete, the court concluded that the Act provides "a full and adequate hearing" to a party who receives a citation. *Id.* at 12. The court also observed that petitioner could avoid significant penalties either by abating the violation while challenging the citation or by requesting an expedited hearing if it chose to remain in noncompliance. *Id.* at 14; see also 30 U.S.C. 815(d); 29 C.F.R. 2700.52. The court rejected petitioner's contention that it would be irreparably harmed if it were required to permit the UMWA employees to act as miners' representatives pending the outcome of the administrative process. It found no reason to believe that MSHA would permit representatives to act beyond the scope of their duties under the Mine Safety Act, and

concluded that the Act's procedures are adequate to challenge such conduct if it occurs. Pet. App. 14-16.[5]

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[5] While respondents' appeal of the preliminary injunction was pending, the district court held a trial on the merits. The court concluded, without addressing petitioner's due process claim, that it was unreasonable and would conflict with the NLRA for the Secretary to permit miners to designate union personnel as representatives under the Mine Safety Act. See *Thunder Basin Coal Co.* v. *Martin*, No. 91-CV-0050-B (D. Wyo. Mar. 13, 1992). The court accordingly entered a permanent injunction barring the Secretary from enforcing his regulations in a manner that would require petitioner to admit union personnel to its mine.

Respondents appealed the permanent injunction. *Martin* v. *Thunder Basin Coal Co.*, No. 92-8030 (10th Cir. July 20, 1992). Petitioner sought to stay the court's determination of the appeal of the preliminary injunction and to consolidate it with respondents' appeal of the permanent injunction. In its decision reversing the preliminary injunction, the court of appeals denied the motion for a stay and consolidation, on the ground that the parties had had ample opportunity to argue the dispositive jurisdictional issue. Pet. App. 7 n.3. On the same day, the court of appeals issued an order to show cause why respondents' appeal of the permanent injunction should not be dismissed for want of jurisdiction, in light of its decision, at issue here, ordering dimissal of the case. The court subsequently dismissed the appeal in No. 92-8030, but stayed its mandate on that appeal pending the filing and disposition of a petition for a writ of certiorari in this case.

Neither party has argued that the district court's entry of the permanent injunction rendered the preliminary injunction moot, such that the court of appeals could not dispose of the jurisdictional issue and order dismissal of the case on respondents' appeal of the preliminary injunction. Compare *Sale* v. *Haitian Centers Council, Inc.*, No. 92-528 (June 28, 1993) (vacating as moot court of appeals' decision affirming preliminary injunction in light of the subsequent entry of a permanent injunction). The court of appeals in this case had both appeals pending before it. Because the overall case is not moot, the court of appeals' decision to address a jurisdictional issue common to both appeals in the context of one appeal rather than the other presents no Article III mootness concern.

SUMMARY OF ARGUMENT

I. The Mine Safety Act's text, structure, and legislative history evince a clear congressional intent to channel judicial review to the courts of appeals and away from the district courts. The Act's procedures for administrative and judicial review are comprehensive. They place no limits on either the Commission's or the courts of appeals' authority to review a citation or penalty. At the same time, the Act grants the district courts jurisdiction in two limited circumstances, and only in suits by the Secretary. In light of these carefully drawn provisions, the procedures for mine operators to obtain judicial review of enforcement disputes in the courts of appeals are exclusive. The legislative history reinforces that conclusion, because it manifests a purpose to centralize consideration of enforcement matters in the Commission before they are brought to the courts, and to oust the district courts of jurisdiction they had under the predecessor statute.

Petitioner relies on decisions of this Court permitting district court review under other statutes because the evidence of congressional intent to preclude such review was insufficient. Those cases are inapposite, however, because they involved the question whether "Congress intended to foreclose all forms of meaningful judicial review" of the agency action. *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991). Here, Congress has provided for judicial review in the courts of appeals, and that review is meaningful and adequate.

Nothing about the nature of petitioner's claim supports circumvention of the Commission followed by direct review in a court of appeals. At bottom, petitioner presents a routine dispute over the scope of the Mine Safety Act, when read in light of the National Labor Relations Act. The Commission has the power and expertise to resolve that dispute, and it resolved the precise issue in a case involving another mine operator. The Commission also

considers constitutional issues in enforcement proceedings. After the Commission's proceedings are complete, petitioner may then seek judicial review of its decision on both statutory and constitutional grounds.

Petitioner errs in arguing that the Mine Safety Act's review procedures violate due process by putting it to an impermissible choice between forfeiting its "right" under the NLRA to exclude union employees and complying with a citation for failure to post the designation of miners' representatives at its mine. Petitioner is entitled to stand on its asserted "right" under the NLRA to exclude union employees while administrative proceedings are pending, rather than comply with a citation (should one be issued). Moreover, MSHA only proposes penalties; it is the Commission that actually assesses them. And a mine operator is not required to pay penalties until judicial review is completed. Thus, petitioner would experience no pre-hearing "deprivation" if MSHA issued a citation or proposed a penalty; and, in any event, any such deprivation could be fully remedied by the Commission or a court of appeals in reviewing a penalty.

II. Even if district court jurisdiction is not barred, dismissal of the complaint was proper on other grounds.

A. Although petitioner invoked 28 U.S.C. 1331 as a basis for jurisdiction in the district court, that statute does not create any cause of action. Petitioner must look elsewhere for a cause of action against the government. The Administrative Procedure Act (APA) provides a cause of action for persons aggrieved by agency action, but it limits that cause of action to the relevant statutory review procedure unless that procedure is inadequate. 5 U.S.C. 703. Because the Mine Safety Act's review procedure is plainly adequate, the APA does not permit petitioner to sue in district court. Moreover, the APA provides for judicial review only of "final agency action." 5 U.S.C. 704. In this case, petitioner does not challenge the issuance of regulations (which presumably would constitute final

agency action), but rather challenges a particular interpretation of regulations communicated to it by a MSHA official. Neither the Secretary nor the Commission has taken any enforcement action whatever (much less final agency action) against petitioner on the basis of that interpretation.

B. Even if there were "final agency action," the controversy is not ripe. First, the issues are not presently fit for judicial review, because development of a factual record before the Commission in a particular application of the regulations would shed light on the nature of inspections and the role of miners' representatives under the Act. Second, petitioner would not experience substantial hardship if it respected its employees' designation of representatives pending Commission review.

C. Dismissal also was proper under principles governing exhaustion of administrative remedies. The Mine Safety Act requires any person wishing to contest a citation or proposed penalty to seek review before the Commission. Adherence to that procedure would serve the purposes of the exhaustion doctrine by enabling the Commission to exercise its expertise and develop a factual record to facilitate judicial review.

ARGUMENT

THE DISTRICT COURT WAS WITHOUT AUTHORITY TO ADJUDICATE PETITIONER'S OBJECTIONS TO THE DESIGNATION OF MINERS' REPRESENTATIVES

The question in this case is whether the Mine Safety Act requires judicial review of petitioner's objections to its employees' designation of miners' representatives to take place in the court of appeals, after the comprehensive administrative review process has run its course, rather than in district court. Thus, contrary to the fundamental premise of petitioner's argument, this case does not involve a true question of preclusion of judicial review. The issue, rather, is whether Congress has channeled review to one court rather than another. We submit that the text and structure of the Mine Safety Act, as well as this Court's cases, compel the conclusion that petitioner's claims may be brought only in the court of appeals, after the Commission has rendered a final decision in an enforcement action. Any other result would permit mine operators and others routinely to evade the comprehensive statutory procedures for administrative and judicial review simply by filing an anticipatory suit in a federal district court.

The conclusion that the district court was precluded from entertaining petitioner's suit is reinforced by the fact that there is in any event no "final agency action" that would be subject to judicial review in the district court under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* MSHA has not issued a citation or proposed a civil penalty to be assessed against petitioner based on a failure to comply with 30 C.F.R. Pt. 40; and, even if it had, neither the citation nor the proposed penalty would be final agency action subject to judicial review at that point, but rather would first have to be challenged by petitioner before the Commission. For similar reasons, the dismissal

of petitioner's suit was required because the MSHA district manager's interpretation in this setting of the regulations governing designation of miners' representatives is not ripe for judicial review in the absence of a concrete application of the regulations by MSHA and the Commission in a particular enforcement context, and because petitioner would then have to comply with established principles requiring exhaustion of administrative remedies. These three additional defects in petitioner's suit—the absence of "final agency action," the lack of a ripe controversy, and the absence of any resort to administrative remedies—would be cured if judicial review took place in the manner expressly provided for in the Act.

I. THE MINE SAFETY ACT PRECLUDED THE DISTRICT COURT FROM EXERCISING JURISDICTION OVER PETITIONER'S CLAIMS

A. The Act's Comprehensive Scheme Channels Judicial Review Of Petitioner's Claims Exclusively To The Court Of Appeals, After Completion Of The Administrative Process

1. The Mine Safety Act's text, structure, and legislative history evince a clear congressional intent to channel judicial review to the courts of appeals and away from the district courts. *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 345 (1984). In similar circumstances, this Court has concluded that the review scheme provided by statute is exclusive and leaves no room for any residual jurisdiction to be exercised by the district courts under more general jurisdictional provisions. *Board of Governors v. MCorp Financial, Inc.*, 112 S. Ct. 459, 464-466 (1991); *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965); *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50 (1938).[6] The same conclusion follows here.

[6] The lower courts have followed suit in the context of other statutory schemes establishing a comprehensive administrative scheme followed by judicial review in the courts of appeals. *E.g.*, *Southern Pines Assocs.* v. *United States*, 912 F.2d 713, 715 (4th Cir. 1990) (Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*); *Gaunce* v. *deVincentis*, 708 F.2d 1290, 1292 (7th Cir.) (per curiam) (Federal Aviation Act of 1958, 49 U.S.C. App. 1301 *et seq.*), cert. denied, 464 U.S. 978 (1983); *Denberg* v. *United States R.R. Retirement Bd.*, 696 F.2d 1193 (7th Cir. 1983) (Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.*), cert. denied, 466 U.S. 926 (1984); *CETA Workers' Org. Comm.* v. *City of New York*, 617 F.2d 926, 936 (2d Cir. 1980) (Comprehensive Employment and Training Act Amendments of 1978, Pub. L. No. 95-524, 92 Stat. 1909 (repealed 1982)); *Anaconda Co.* v. *Ruckelshaus*, 482 F.2d 1301 (10th Cir. 1973) (Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (formerly codified at 42 U.S.C. 1857 *et seq.*)).

Congress specified in the Mine Safety Act the events that trigger a right of judicial review and the prerequisites to obtaining that review. Under the statutory scheme, the Secretary is obliged to issue a citation upon determining that a mine operator has violated the Act or a standard or regulation promulgated under it, and to set a time limit in which the operator must abate the violation. See 30 U.S.C. 814(a). If the Secretary determines that a civil penalty is warranted, he then must notify the operator of the proposed civil penalty to be assessed for the violation. See 30 U.S.C. 815(a), 820(a) (Supp. III 1991). An operator wishing to contest the Secretary's action then has 30 days within which to invoke the administrative review process. That process is entirely independent of the Department of Labor. It consists first of a hearing before an ALJ, 30 U.S.C. 815(a) and (d), 823(d)(1), followed by discretionary review by the Commission. 30 U.S.C. 823(d)(2)(A)(i). At that point, any party "adversely affected or aggrieved" by a Commission order is entitled to judicial review in the courts of appeals. 30 U.S.C. 816(a)(1).[7]

[7] Once an aggrieved party seeks judicial review in a particular court of appeals, the Act provides that the jurisdiction of that court is "exclusive." 30 U.S.C. 816(a)(1).

The Mine Safety Act places no limits on the nature or scope of the violations that are subject to this scheme. See 30 U.S.C. 814(a) (Secretary shall issue a citation for violation of "any mandatory health or safety standard, rule, order, or regulation promulgated" under the Act). Nor does the Act place any limits on an aggrieved party's right to obtain Commission review of the Secretary's determination, or judicial review in the courts of appeals. The circumstances of this case thus fall within the principle, long established in this Court's cases, that the review process established by statute for a category of controversies is exclusive and does not permit district courts to exercise jurisdiction over the same controversies. *MCorp Financial, Inc.*, 112 S. Ct. at 465-466; *Whitney Nat'l Bank*, 379 U.S. at 420; see 5 U.S.C. 703 (under the APA, "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute").[8]

Petitioner asserts (Br. 17-24) that the comprehensiveness of the statutory scheme is immaterial, because the Act does not in terms bar the district courts from exercising their general federal question jurisdiction. In petitioner's view, a preclusion of review in the district court should be found only if Congress "employs unambiguous language to that end." Pet. Br. 20. That argument finds no support in this Court's cases. Rather, the Court has held that a statutory preclusion of review—even one that altogether bars a party from obtaining judicial review of particular agency action, rather than, as here, one that merely channels judicial review to a particular forum—can be based on "inferences of intent drawn from the statutory scheme as a whole." *Block*, 467 U.S. at 349. Thus, specific language or history addressing the question of preclusion of district court jurisdiction is unnecessary, so long as "the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" *Id.* at 351 (quoting *Association of Data Processing Service Orgs., Inc.* v. *Camp*, 397 U.S. 150, 157 (1970)); see also *United States* v. *Fausto*, 484 U.S. 439, 452 (1988).[9] Similarly, in *Whitney Nat'l Bank*, the Court held that Congress's failure explicitly to preclude district court jurisdiction "does not require a different conclusion," because where Congress "has enacted a specific statutory scheme for obtaining review, * * * the statutory mode of review [must] be adhered to notwithstanding the absence of an express statutory command of exclusiveness." 379 U.S. at 422.

[8] A number of district courts have held that the Mine Safety Act's procedures for administrative and judicial review deny them jurisdiction to resolve disputes arising under the statute. In *Bituminous Coal Operators' Ass'n* v. *Marshall*, 82 F.R.D. 350, 352 (D.D.C. 1979) (see Pet. App. 5), the district court concluded that it had no jurisdiction over a pre-enforcement challenge to an Interpretative Bulletin issued by the Secretary that clarified miners' walk-around rights under 30 U.S.C. 813(f), because "[t]he structure of the Act * * * makes it quite clear that Congress intended that all legal challenges to the Act, to its enforcement and to any regulations promulgated thereunder be heard by the Federal Courts of Appeals, not by the Federal District Courts." See also *Council of S. Mountains, Inc.* v. *Donovan*, 516 F. Supp. 955 (D.D.C. 1981); *United States Steel Corp.* v. *Marshall*, 471 F. Supp. 438 (W.D. Pa. 1979); cf. *Coal Employment Project* v. *Dole*, 889 F.2d 1127 (D.C. Cir. 1989). But see *Zeigler Coal Co.* v. *Marshall*, 502 F. Supp. 1326 (S.D. Ill. 1980).

[9] In *Block*, the Court concluded that *no* judicial review in any forum was available to milk consumers who wished to challenge certain milk marketing orders issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.* That statute established a complex administrative and judicial review process that gave a right of review to milk processors ("handlers"), without mentioning milk consumers or other parties. This Court concluded that the structure of the statute indicated a congressional intent to limit a right of judicial review to the handlers, and that to conclude otherwise "would severely disrupt th[e] complex and delicate administrative scheme." 467 U.S. at 348. The result in this case follows *a fortiori* from *Block*. Unlike the milk consumers in *Block*, petitioner concededly is entitled to judicial review at some point. The only question is where and when that review will take place.

Moreover, the premise of petitioner's argument—that the Mine Safety Act itself is silent on the question of suits brought in the district courts—is incorrect. The Act in fact specifies those situations in which district courts may consider claims arising under it. First, 30 U.S.C. 818(a) authorizes "[t]he Secretary" to "institute a civil action" in district court to enjoin a party from violating the Act or rules or standards issued under the Act, and to enforce orders of the Commission. Second, 30 U.S.C. 820(j) gives district courts jurisdiction over actions brought by the Secretary to collect civil penalties assessed under the Act. Section 818, which petitioner fails to cite, is particularly significant, because it grants only the Secretary the right to bring an action in district court concerning enforcement of the Act and implementing regulations. By contrast, nothing in the Act permits district courts to exercise jurisdiction over similar suits by mine operators or any other private party concerning enforcement of the Act; it instead specifically directs the claims of those parties to the courts of appeals, and then only after MSHA has instituted enforcement proceedings and the administrative process has run its course. "In the context of the statute's precisely drawn provisions," the omission of any provision for judicial review of enforcement matters in the district courts at the behest of private parties "provides persuasive evidence that Congress deliberately intended to foreclose * * * review of such claims." *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982); see also *Fausto*, 484 U.S. at 448; *Block*, 467 U.S. at 347-352; *Myers*, 303 U.S. at 48.[10]

Petitioner's contrary position would be fundamentally inconsistent with, and destructive of, the statutory scheme. As the events in this case demonstrate, permitting district

[10] See also *Pacific Power & Light Co.* v. *Bonneville Power Admin.*, 795 F.2d 810, 814 (9th Cir. 1986) (where statute differentiates between matters subject to district and appellate court jurisdiction, that scheme is exclusive); *Denberg*, 696 F.2d at 1195; *CETA Workers' Org. Comm.*, 617 F.2d at 935 n.9; Pet. App. 10-11.

courts to entertain suits intended to preempt the administrative enforcement scheme would threaten the very "effectiveness of the statutory design." *Whitney Nat'l Bank*, 379 U.S. at 420. Indeed, in this case, the assumption of jurisdiction by the district court cut off the statutory scheme entirely. By enjoining MSHA from enforcing 30 C.F.R. Pt. 40 against petitioner, the district court prevented issuance of a citation or assessment of a civil penalty, which in turn would have provided an occasion for petitioner to obtain review by the Commission and then the court of appeals. Under this Court's cases, petitioner "may not evade" the statutory process in that manner. *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984); see also *Heckler* v. *Ringer*, 466 U.S. 602, 621-622 (1984) (Medicare claimant may not avoid statutory procedures for administrative and judicial review by filing anticipatory action for declaratory judgment in district court); *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69-70 (1970); *Whitney Nat'l Bank*, 379 U.S. at 419-422; *Myers*, 303 U.S. at 48; *FTV* v. *Claire Furnace Co.*, 274 U.S. 160, 173-174 (1927); *Telecommunications Research & Action Center* v. *FCC*, 750 F.2d 70, 78 (D.C. Cir. 1984) (*TRAC*).[11]

[11] The reliance by petitioner (Br. 20) and its amici (American Mining Cong. Br. 11-12) on 30 U.S.C. 960 is misplaced. Section 960 states that "[i]n any proceeding in which the validity of any interim mandatory health or safety standard * * * is in issue, no justice, judge, or court of the United States shall issue any temporary restraining order or preliminary injunction" restraining enforcement pending a determination on the merits. This provision says nothing about the courts in which challenges to MSHA or Commission action may be brought; it simply proscribes a particular form of temporary relief in such a case.

Moreover, the Act provides that interim standards, which are derived from standards in effect under predecessor statutes, "shall be enforced in the same manner and to the same extent" as the mandatory health and safety standards that the Secretary is authorized to promulgate under 30 U.S.C. 811. See 30 U.S.C. 841(a),

2. Petitioner relies (Br. 21-24) on the Mine Safety Act's legislative history as evincing an intent to permit district court jurisdiction over disputes arising under the Act. The legislative history, however, demonstrates just the opposite. The Act was passed to centralize consideration of all enforcement disputes arising under it in the Commission, and it *divested* the district courts of the jurisdiction over such disputes that they had previously had.

Under the Mine Safety Act's predecessor statute, the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 (Coal Act) (formerly codified at 30 U.S.C. 801 *et seq.* (1976)), mine operators had the right directly to contest civil penalty assessments in district courts. See Pub. L. No. 91-173, § 109(a)(4), 83 Stat. 756 (30 U.S.C. 819(a)(4) (1976)). In those actions, the district courts reviewed "de novo all relevant issues," with only limited exceptions. *Ibid.*; see also S. Rep. No. 181, *supra*, at 45. Responding to problems of delayed enforcement under the predecessor act, Congress eliminated "[t]his lengthy, and often repetitive procedure," *id.* at 44, and substituted plenary review before the Commission in its place. *Id.* at 45-46. Congress thus explicitly divested the district courts of jurisdiction over disputes concerning application of the Act and implementing standards and regulations, and instead channeled all such disputes to a new agency that could be expected to resolve those disputes more efficiently. It would be odd for Congress to restructure the review process in that manner, and at the same time expect district courts nonetheless to entertain Mine Safety Act enforcement disputes, which are undoubtedly subject to Commis-

861(a). Thus, violations of interim standards are subject to citations, proposed penalties, and challenges through the Act's exclusive review scheme, and enforcement of those standards may not be enjoined by a district court or any other court pending exhaustion of the Act's remedies.

sion review, followed by judicial review in the courts of appeals.[12]

Petitioner's primary argument (Br. 23) from the legislative history of the Act is based on the Senate Report's passing citation of the Fourth Circuit's decision in *Bituminous Coal Operators' Ass'n* v. *Secretary of Interior*, 547 F.2d 240 (1977) (*BCOA*), in which the court concluded that the predecessor statute to the Mine Safety Act did not bar district court jurisdiction over a pre-enforcement challenge. See S. Rep. No. 181, *supra*, at 14.[13] As petitioner concedes (Br. 22-23), however, the Senate Report's citation of *BCOA* referred only to the merits of the Fourth Circuit's decision, which concerned the authority of the Secretary to enforce the Act against construction companies at a mine site. Petitioner nonetheless argues (Br. 22) that Congress ratified that decision's jurisdictional holding by failing to reject it. Petitioner relies on the principle that Congress may be held to have ratified "earlier judicial interpretations" of a statute "and, in effect, adopt[s] them" when it reenacts a statute without rejecting the prior construction. *Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2043 (1993); see also *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). That proposition, however, does not support petitioner here.

[12] Petitioner and its amici claim (Pet. Br. 23 n.22; American Mining Cong. Br. 11 n.14) that Congress's elimination of *de novo* trials in district court over penalty assessments evinces no intent to preclude *pre*-enforcement challenges in that forum. That argument, however, is inconsistent with the entire scheme of the Mine Safety Act, which places authority in the Commission to entertain such disputes out of a desire to centralize and streamline the process.

[13] Petitioner also relies (Br. 23-24 n.23) on an isolated floor statement of Senator Javits to the effect that mine operators would retain their right of access to "Federal courts" to contest Mine Safety Act disputes. 123 Cong. Rec. 19,927 (1977). That statement, of course, is entirely consistent with requiring mine operators to follow the prescribed statutory procedure, which culminates with judicial review in the courts of appeals.

First, in supplanting the Coal Act (under which *BCOA* was decided) with the Mine Safety Act, Congress changed the statutory review scheme in significant ways. Most importantly, Congress divested the district courts of their jurisdiction (specifically noted by the court in *BCOA*, see 547 F.2d at 243 & n.10) to hear challenges to civil penalty determinations—and thereby to resolve questions arising under the Act and implementing regulations in the course of doing so. The Mine Safety Act also worked a dramatic change in the statutory review process in its creation of the Commission and its vesting in the Commission of jurisdiction to consider all disputes that arise under the Act. Thus, although Congress did not reject *BCOA* by name, the statutory scheme it enacted is fundamentally inconsistent with the jurisdictional arrangement contemplated by the Fourth Circuit's decision in that case.

It would in any event be inappropriate to regard the Mine Safety Act as ratifying, sub silentio, the decision in *BCOA*. This Court has recently reaffirmed (see *Keene Corp.*, 113 S. Ct. at 2043) that the principle on which petitioner relies applies only where the courts had arrived at a "settled judicial construction" of a statute prior to its amendment or reenactment. *United States* v. *Powell*, 379 U.S. 48, 55 n.13 (1964). A single court of appeals decision of dubious merit—rendered prior to this Court's decisions in *Block* v. *Community Nutrition Inst.*, *supra*, *United States* v. *Fausto*, *supra*, and *Board of Governors* v. *MCorp Financial, Inc.*, *supra*—hardly qualifies as a "settled judicial construction" that binds all federal courts, especially when Congress has fundamentally amended the statute it interpreted.

3. Seeking to paint this as a case involving preclusion of all judicial review, petitioner relies (Br. 15-16) on the "strong presumption that Congress intends judicial review of administrative action." *Traynor* v. *Turnage*, 485 U.S. 535, 542 (1988) (quoting *Bowen* v. *Michigan Academy*

of Family Physicians, 476 U.S. 667, 670 (1986)). Petitioner invokes a series of cases in which this Court concluded that the district court had jurisdiction over a controversy because the evidence of congressional intent to preclude review was insufficient. See *McNary* v. *Haitian Refugee Center, Inc.*, *supra*; *Traynor* v. *Turnage*, *supra*; *Mathews* v. *Eldridge*, 424 U.S. 319 (1976); *Oestereich* v. *Selective Service System*, 393 U.S. 233 (1968); *Leedom* v. *Kyne*, 358 U.S. 184 (1958).

In those cases, however, the question was whether "Congress intended to foreclose all forms of meaningful judicial review" of the particular agency action at issue. *McNary*, 498 U.S. at 496. The Court has been reluctant to conclude that Congress intended to do so—although it has on occasion found that to be Congress's intent, see *Block*, 467 U.S. at 345-352. The situation here is far different because Congress has plainly prescribed "a meaningful and adequate opportunity for judicial review" of petitioner's claims. *MCorp Financial, Inc.*, 112 S. Ct. at 466.

For similar reasons, petitioner's reliance (Br. 16, 17, 19) on *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), is also misplaced. In that case, the question was whether the Federal Food, Drug, and Cosmetic Act (Drug Act), 21 U.S.C. 301 *et seq.*, prohibited pre-enforcement judicial review of certain regulations promulgated under that Act, in light of the statute's grant of jurisdiction to the courts of appeals to consider pre-enforcement challenges to certain other types of regulations. See *Abbott Laboratories*, 387 U.S. at 141 & n.3. The Court pointed out that the regulations constituted "final agency action" within the meaning of the APA and that the APA provides for judicial review not only of "[a]gency action made reviewable by statute," but also of "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. 704. See 387 U.S. at 140-141, 148, 149. Those provisions, the Court explained, create a presump-

tion in favor of judicial review and should be given a "hospitable" interpretation. *Id.* at 141.

After examining the Drug Act's text and legislative history, the Court concluded in *Abbott Laboratories* that the provision permitting direct review in the courts of appeals of certain sorts of regulations was not intended impliedly to preclude review of other regulations in district court. 387 U.S. at 142-144. The Court found that conclusion to be "strongly buttressed" by the Drug Act's saving clause, 21 U.S.C. 371(f)(6), which provided that the statute's specific judicial review provisions were "in addition to and not in substitution for any other remedies provided by law." See 387 U.S. at 144. On that basis, the Court concluded that the provisions for pre-enforcement judicial review in certain circumstances did not justify an inference that Congress intended thereby to supplant the general equitable jurisdiction of the district courts. *Ibid.*; accord *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167, 168 (1967).

This case is completely different. In the first place, petitioner does not challenge "final agency action," for which the APA creates the presumption in favor of judicial review that the Court relied upon in *Abbott Laboratories*. We may assume for present purposes that the Secretary's promulgation in 1978 of the regulations governing selection of miners' representatives was "final agency action." But petitioner does not challenge the lawfulness of those regulations, and any such challenge at this late date (especially in a *pre*-enforcement action) would confront a serious laches obstacle. Petitioner instead challenges only a particular interpretation and anticipated application of those regulations. MSHA, however, has not issued a formal citation or proposed a civil penalty against petitioner based on the disputed interpretation, and there accordingly has been no final decision by the Commission on any such action by MSHA. This suit was triggered by nothing more than communications between the MSHA district manager and petitioner, which plainly do not constitute "final agency action." See pp. 42-43, *infra*.

Second, when it enacted the Mine Safety Act, Congress did not provide a "circumscribed remedy," *Abbott Laboratories*, 387 U.S. at 141, for resolution of only certain disputes concerning enforcement of the Act and implementing regulations. The Act's procedures for administrative and judicial review are comprehensive. Significantly, in *Abbott Laboratories* itself, the Court stressed that where the special provisions of the Drug Act that provide for judicial review in a court of appeals apply, "presumably they must be used and a court would not grant injunctive or declaratory judgment relief unless the appropriate administrative procedure is exhausted." 387 U.S. at 146; compare *Reno* v. *Catholic Social Services, Inc.*, No. 91-1826 (June 18, 1993), slip op. 17. So too here, because the special statutory review procedures apply to the possible enforcement dispute petitioner foresees, a district court may not grant injunctive or declaratory relief with respect to that same dispute.[14]

Nor, contrary to petitioner's contention (Br. 12, 27), is this case at all like *Oestereich* v. *Selective Service System*, *supra*, or *Leedom* v. *Kyne*, *supra*. In those cases,

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[14] In fact, this case is very much like *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950), a case distinguished in *Abbott Laboratories*. See 387 U.S. at 146-148. As the Court explained in *Abbott Laboratories*, *Ewing* held that "the owner could raise his constitutional, statutory, and factual claims in the libel actions themselves, and that the mere finding of a probable cause by the Administrator could not be challenged in a separate action." 387 U.S. at 147. Relief in a collateral action "was not specifically granted by the Act, which did provide another type of relief in the form of a consolidation of multiple libel actions in a convenient venue." *Id.* at 148. Here, too, the operator may raise its constitutional, statutory, and factual claims in the administrative and judicial enforcement proceedings themselves, and the Act specifically provides another type of judicial relief—in the court of appeals.

the agency action at issue was facially *ultra vires*, it interfered with rights conferred on the plaintiffs by the same Act under which the agency had acted, and if suits in district court were barred, there would have been no judicial review of any sort. *Oestereich*, 393 U.S. at 235-237; *Leedom*, 358 U.S. at 185. Here, whatever the merits of petitioner's claims, there can be no credible contention that the Mine Safety Act itself *prohibits* union employees from acting as miners' representatives or confers a right on mine operators to bar them from doing so. More importantly, this Court's recent decision in *MCorp Financial, Inc.*, 112 S. Ct. at 465-466 & n.16, makes clear that a district court may not assume jurisdiction under the rationale of *Leedom* and *Oestereich* if Congress has otherwise provided an avenue for administrative and judicial review of the plaintiff's claim. "If and when" the Commission concludes that petitioner has violated the Mine Safety Act and its implementing regulations, petitioner "will have, in the Court of Appeals, an unquestioned right to review of both the regulation[s] and [their] application." *MCorp Financial, Inc.*, 112 S. Ct. at 466. See also *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943).

B. Nothing About The Nature Of Petitioner's Claims Justifies The Exercise Of General Federal Question Jurisdiction By The District Court

Petitioner relies (Br. 25, 29) on the nature of its claims to justify the exercise of district court jurisdiction. There is no basis, however, for bypassing the statutory scheme established by Congress for review of disputes that arise under the Mine Safety Act, as this one plainly does. At bottom, petitioner's claim constitutes a garden variety disagreement over the proper interpretation of the Mine Safety Act—a matter that the Commission has the power and expertise to decide, subject to judicial review in the court of appeals after it has done so.

1. The underlying issue that petitioner brought to the district court was whether miners' representatives selected under 30 U.S.C. 813(f) and the Secretary's implementing regulations may include union employees in a non-union mine. Although that issue implicates the relationship of the Mine Safety Act and the NLRA, its resolution ultimately turns on the meaning of the Mine Safety Act, a subject that lies at the core of the Commission's jurisdiction and expertise.[15] Not only has the Commission had many occasions to consider the scope and application of 30 U.S.C. 813(f),[16] but it has recently decided the precise issue raised by petitioner in this case. See *Kerr-McGee Coal Corp.* v. *Secretary of Labor*, 15 F.M.S.H.R.C. 352 (1993), petition for review pending, No. 93-1250 (D.C. Cir. filed Apr. 1, 1993).[17]

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[15] Petitioner errs in arguing (Br. 27-28) that the Commission's expertise in Mine Safety Act issues is irrelevant to its ability to decide petitioner's statutory claim. Even under petitioner's view that this case presents a "conflict" between the Mine Safety Act and the NLRA, the Commission's expertise in construing and applying the Mine Safety Act is highly relevant. The Commission —and not a federal district court—is in the best position to understand how miners' representatives function in practice, the nature and scope of information to which they are privy, and the impact their presence may have on a mine's operation.

[16] See, *e.g.*, *Cyprus Empire Corp.* v. *Secretary of Labor*, 15 F.M.S.H.R.C. 10, 13-15 (1993) (striking employees of mine not entitled to designate representative under 30 U.S.C. 813(f) because they do not fall within statutory definition of miners); *Emery Mining Corp.* v. *Secretary of Labor*, 10 F.M.S.H.R.C. 276, 283-286 (1988) (miners may designate representatives who do not work at mine), aff'd in part and rev'd in part *sub nom. Utah Power & Light Co.* v. *Secretary of Labor*, 897 F.2d 447 (10th Cir. 1990); *Truex* v. *Consolidation Coal Co.*, 8 F.M.S.H.R.C. 1293, 1298 (1986) (mine operators have no right to designate miners' representatives); see also *Secretary of Labor* v. *Mid-Continent Resources, Inc.*, 12 F.M.S.H.R.C. 949, 953-954 (1990) (Commission has authority to issue declaratory relief where operator of non-union mine has refused access to miners' representative affiliated with UMWA).

[17] In that case, miners at Kerr-McGee's non-union mine designated employees of the UMWA as their walk-around representatives

In *Kerr-McGee*, the Commission held that 30 U.S.C. 813(f) "does not prohibit miners from designating agents of a union as their walkaround representatives on the basis that such miners are not represented by the union for collective bargaining purposes," because "the concept of representative as it has developed under the NLRA is not determinative of the miners' representative designation process under [30 C.F.R.] Part 40." 15 F.M.S.H.R.C. at 361-362. In so holding, the Commission relied on its prior decision in *Emery Mining Corp.* v. *Secretary of Labor*, *supra*, which held that 30 U.S.C. 813(f) "imposes no employee-status limitation" on the miners' choice of their representatives. *Kerr-McGee*, 15 F.M.S.H.R.C. at 360 (quoting *Emery Mining Corp.*, 10 F.M.S.H.R.C. at 284). The Commission found "no basis" in the Act or regulations for limiting that right "to situations where the designated representative is a member of a union that also represents the miners for collective bargaining purposes under the NLRA." *Kerr-McGee*, 15 F.M.S.H.R.C. at 361.

The Commission in *Kerr-McGee* thoroughly addressed the operator's claim that enforcement of the Secretary's walk-around regulations in that setting would conflict with the NLRA. The Commission concluded that there is no reason to incorporate the NLRA's concept of a collective bargaining representative into the meaning of "representative" under 30 U.S.C. 813(f). 15 F.M.S.H.R.C. at 362; see *id.* at 359 & n.8 (Secretary rejected, in regu-

under the Act. The Secretary issued a citation to the mine operator because it refused to post the notice of designation, as required by 30 C.F.R. 40.4. The Commission framed the issue before it as "whether miners may choose as their representative for 'walk-around' purposes under section 103(f) of the Mine Act [30 U.S.C. 813(f)] * * * a union, or the agent of a union, that is not the miners' collective bargaining representative under the National Labor Relations Act." 15 F.M.S.H.R.C. at 352. That is the precise issue posed by petitioner's challenge to the anticipated enforcement of the regulations in this case.

latory preamble, adoption of NLRA definition of "representative."). The Commission also considered this Court's recent decision in *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841 (1992)—upon which petitioner relies (Br. 12, 25-26, 44)—and concluded that it did not compel a different result. *Lechmere*, the Commission explained, involved the degree to which the NLRA permitted access by "nonemployee union organizers to employers' private property," but had nothing to do with the separate question whether the Mine Safety Act's walk-around rights must yield to mine operators' property rights. *Kerr-McGee*, 15 F.M.S.H.R.C. at 362.[18]

[18] Petitioner argues (Br. 25-29) that the Commission erred in concluding that the NLRA does not give mine operators a virtually unfettered right to exclude union employees from their property. Petitioner overreads *Lechmere*. In *Lechmere*, this Court reaffirmed (112 S. Ct. at 848) its prior holdings that the right to organize under the NLRA does not overcome an employer's common law right to exclude trespassers, unless other "reasonable efforts by the union * * * will [not] enable it to reach the employees" or "the employer[] * * * discriminate[s] against the union by allowing other distribution." *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). This Court has never held, however, that the NLRA itself confers on employers a right to exclude union personnel from their property; it has simply held that the right to organize given to employees under the NLRA permits union organizers to overcome employers' state-law property rights only in limited circumstances. See *Lechmere*, 112 S. Ct. at 846-848. The analysis in *Lechmere* therefore has no bearing on the degree to which the Mine Safety Act overcomes mine operators' property rights. After all, permitting *any* non-employee representative of miners to participate in mine inspections in effect authorizes what would otherwise be a trespass.

Moreover, neither the Secretary nor the Commission has ever taken the position that it would be appropriate for a miners' representative to engage in any union organizing activity in the course of his duties as a representative. See J.A. 49-50 (assuring petitioner that miners' representatives would be permitted to engage only in conduct authorized by the Mine Safety Act). It is clear under *Lechmere* that the NLRA does not force an employer to

The Commission recognized, however, that allowing a union agent "limited access to mine property * * * is subject to possible abuse." *Kerr-McGee*, 15 F.M.S.H.R.C. at 361. Finding the allegation that such abuse would occur to be merely speculative, however, the Commission held that actual instances of abuse could be "addressed on an individual basis * * * while generally preserving the right of miners to select representatives of their choice." *Id.* at 361-362 (citing *Utah Power & Light Co.* v. *Secretary of Labor*, 897 F.2d 447, 452 (10th Cir. 1990)). Indeed, in this case, petitioner was assured by MSHA that "the right of the miners' representative * * * to participate" in inspections "is not an uncontrolled access right to the mine property to engage in any activity that the miners' representative wants." J.A. 49. Rather, "[t]he MSHA inspector controls the inspection, and it is the inspector's responsibility to ensure that the miners' representative [*sic*] activities are limited to aiding the inspection and not to engage in other unrelated activities." *Id.* at 50.

Thus, *Kerr-McGee* demonstrates that the process for administrative and judicial review provided in the Mine Safety Act is perfectly suited to consideration of petitioner's claim of a statutory conflict.[19] Petitioner is obviously

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permit union access *for that purpose*, absent unusual circumstances. That holding does not speak at all to the question whether the Mine Safety Act requires union personnel to be permitted on a mine operator's property *for an entirely separate purpose*.

[19] *Kerr-McGee* also illustrates the point that administrative tribunals routinely decide disputes that involve statutes in addition to those they directly administer. See, *e.g.*, *Local 1976, United Bhd. of Carpenters* v. *NLRB*, 357 U.S. 93, 109-111 (1958) (reconciling NLRA and Interstate Commerce Act); *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31, 46-49 (1942) (reconciling NLRA and maritime law). Accord *City of Rochester* v. *Bond*, 603 F.2d 927, 936 (D.C. Cir. 1979) (Federal Aviation Administration, and not district court, has original jurisdiction to resolve alleged conflict between Federal Aviation Act and National Environmental Policy Act); *Connors* v. *Amax Coal Co.*, 858 F.2d 1226, 1230-1231 (7th Cir. 1988) (Benefits Review Board has jurisdiction to resolve case involving federal common law claims and claims under Employee Retirement Income Security Act, as well as under Black Lung Benefits Act); *Carey* v. *O'Donnell*, 506 F.2d 107, 110 (D.C. Cir. 1974), cert. denied, 419 U.S. 1110 (1975).

dissatisfied with the outcome in *Kerr-McGee* (see Pet. Br. 28 n.27, 41 n.40; see also American Mining Cong. Amici Br. 13, 17-18), but a mere disagreement with the agency's position on the merits of a particular issue is an inadequate ground for bypassing the special statutory review mechanism enacted by Congress. There can be no doubt that the decision in *Kerr-McGee*, if followed in a case involving petitioner, would provide an entirely adequate basis for judicial review in the court of appeals. *Connors*, 858 F.2d at 1231; see *Myers*, 303 U.S. at 48-50. The very availability of that avenue of review destroys whatever force petitioner's claim of statutory conflict might otherwise have lent to its invocation of the district court's jurisdiction.[20]

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[20] Contrary to petitioners' assertion (Br. 27, 28-29) this case is far different from *Traynor* v. *Turnage*, *supra*. The question in *Traynor* was whether a statutory provision barring judicial review of individual benefit determinations prevented a district court from hearing a claim that a Veterans Administration regulation was inconsistent with another federal statute. The Court held that the district court had jurisdiction to resolve the claim of statutory conflict because Congress did not intend to "foreclose[] [that claim] from judicial review," 485 U.S. at 545, when it precluded review of individual benefit determinations. In *Traynor*, if the district court did not have jurisdiction, no court did. Under the Mine Safety Act, by contrast, the court of appeals has jurisdiction to consider precisely the same issue that petitioner sought to bring before the district court. Petitioner should not be permitted to undermine the statutory scheme in that manner. See *City of Rochester*, 603 F.2d at 936 ("The policy behind having a special review procedure in the first place * * * disfavors bifurcating jurisdiction over various substantive grounds between district court and the court of appeals."); *TRAC*, 750 F.2d at 72, 78-79 (where statute provides direct review in court of appeals, action for unreasonable delay must also be to court of appeals).

2. Petitioner also argues (Br. 29-30) that the Commission is incompetent to decide its due process challenge, and that the constitutional aspect of this case therefore justified the district court's intervention. That claim is without merit.

a. The Commission has the power to decide constitutional issues that arise in proceedings under the Mine Safety Act's administrative and judicial review scheme. As the court below reasoned, the Mine Safety Act "does not distinguish between challenges to orders based on constitutional grounds or conflict with other statutes and challenges based on misapplication of the Act itself." Pet. App. 8. And the Commission has demonstrated that it is competent to decide constitutional issues, having resolved a wide range of such issues, including due process challenges, under the Act. See, *e.g.*, *Secretary of Labor* v. *Jim Walter Resources, Inc.*, 9 F.M.S.H.R.C. 1305, 1306-1307 (1987) (upholding as consistent with due process the Commission's temporary reinstatement procedures), aff'd, 920 F.2d 738 (11th Cir. 1990); *Secretary of Labor* v. *Alabama By-Products Corp.*, 4 F.M.S.H.R.C. 2128, 2129-2130 (1982) (rejecting vagueness challenge to safety standard promulgated under Act, since reasonably prudent person would have recognized hazard warranting corrective action); see also *Secretary of Labor* v. *Richardson*, 3 F.M.S.H.R.C. 8, 21-28 (1981) (rejecting equal protection challenge to provision of Act), aff'd, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983).[21]

[21] Amici erroneously claim (American Mining Cong. Br. 14, 15-16) that in *Kaiser Coal Corp.* v. *Secretary of Labor*, 10 F.M.S.H.R.C. 1165 (1988), the Commission took a narrow view of its jurisdiction to decide constitutional issues. *Kaiser Coal* did not even involve a constitutional challenge to the Act or its regulations. Rather, in that case, the Commission simply held that in the absence of any "extant enforcement action by the Secretary," *id.* at 1171, as required by the Act's jurisdictional provisions, *id.* at 1169; see 30 U.S.C. 815(b), the Commission ALJs had no jurisdiction to grant declaratory relief. The Commission has reaffirmed that principle on several occasions. *Mid-Continent Resources, Inc.*, 12 F.M.S.H.R.C. at 955; *Beaver Creek Coal Co.* v. *Secretary of Labor*, 11 F.M.S.H.R.C. 2428, 2430-2431 (1989); *Climax Molybdenum Co.* v. *Secretary of Labor*, 2 F.M.S.H.R.C. 2748, 2752 (1980), aff'd, 703 F.2d 447, 452 (10th Cir. 1983).

Thus, this Court's general observation that administrative agencies normally do not decide constitutional issues, see *Califano* v. *Sanders*, 430 U.S. 99, 109 (1977), does not apply to the Commission. That is especially so in this case, where the Commission would not be asked to hold a provision in its organic act unconstitutional (see, *e.g.*, *Weinberger* v. *Salfi*, 422 U.S. 749, 761 (1975), discussing *Johnson* v. *Robison*, 415 U.S. 361, 367-368 (1974)), but would be asked to consider only a procedural due process issue concerning the timing of an administrative hearing. The Commission could address that issue by expediting the hearing before an ALJ and the Commission, if petitioner requested it to do so. Neither petitioner nor its amici have cited any decision questioning the Commission's power or competence to decide such a due process issue. Even if there were some question on that score, however, judicial review of the issue remains available in the court of appeals, where it would be fully considered on the basis of the factual record developed before the Commission. Compare *Salfi*, 422 U.S. at 761-762. Petitioner's assertion that the Commission lacks authority to award it relief on constitutional grounds therefore furnishes no basis for it to bypass the statutory framework and sue in the district court.

b. Petitioner makes an additional due process argument. Apart from the question of the adequacy of administrative and judicial review provided by the Mine Safety Act, petitioner challenges the procedures provided by the Mine Safety Act. In petitioner's view, the Act impermissibly puts it to a choice between complying with a citation MSHA may issue and forgoing its "rights" under the NLRA, and that district court intervention was required

to avoid putting it to that assertedly unconstitutional choice.[22] That claim is wholly baseless, and cannot form the basis for jurisdiction in the district court.

Petitioner contends that it wants only a " 'meaningful' [pre-deprivation] administrative hearing on its statutory-conflict claim." Pet. Br. 34-35, citing *Mathews* v. *Eldridge*, 424 U.S. at 331. In the due process cases upon which petitioner relies, see *Mathews* v. *Eldridge*, *supra*; *Southern Ohio Coal Co.* v. *Donovan*, 774 F.2d 693 (1985), amended, 781 F.2d 57 (6th Cir. 1986), the courts held that a party was subject to a deprivation of a property or liberty interest *before* a meaningful hearing, and that deprivation assertedly caused an irreparable injury that could not be cured by a post-hearing remedy. This Court has never held, however, that every pre-hearing disadvantage implicating a liberty or property interest is impermissible. Rather, a "claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing." *Eldridge*, 424 U.S. at 331.

In this case, petitioner has not demonstrated that the Mine Safety Act review scheme either deprives it of a protected interest prior to a hearing, or that any such injury cannot be cured through a post-hearing remedy. First, if MSHA issues a citation, petitioner may choose not to comply, and thereby stand on its asserted "right" under the NLRA until after the administrative process has been

[22] As we have argued, the NLRA itself gives petitioner no right to exclude union organizers from its property. That right comes from extant property law, and this Court's decision in *Lechmere, Inc.* v. *NLRB*, *supra*, simply holds that the NLRA overcomes those property rights only in limited circumstances. By contrast, 30 U.S.C. 813(f) explicitly gives miners the right to designate representatives of their choice, and gives those representatives the right to enter mine property in the exercise of their statutory duties. Unlike the NLRA, therefore, the Mine Act quite explicitly overcomes whatever state-law interest a mine operator has in excluding outsiders from its property.

completed.[23] In that process, MSHA simply proposes penalties against an operator. See 30 U.S.C. 815(a), (b)(1)(A) and (b)(1)(B). Only the Commission has authority actually to assess a penalty, 30 U.S.C. 820(i), and it must do so *de novo* in light of six statutory criteria. *Sellersburg Stone Co.* v. *Federal Mine Safety & Health Review Comm'n*, 736 F.2d 1147, 1150-1152 (7th Cir. 1984). A mine operator then has a right to judicial review of the Commission's final decision. 30 U.S.C. 816.[24] An operator need not actually pay any penalties until *after* the case is decided on the merits. The Mine Safety Act

[23] Despite its assumption that the maximum statutory penalties would have been imposed in this case had the administrative process been permitted to work, any such penalties remain purely hypothetical. The record is devoid of any evidence that MSHA has even discussed the imposition of penalties for failure to post the designation of representatives in this case. Furthermore, as the court of appeals held (Pet. App. 12), the Mine Safety Act delays payment of penalties (including payment of any daily penalties under 30 U.S.C. 820(b) (Supp. III 1991)) until after the administrative process has run its course. Thus, as we discuss in text, petitioner can be subject to a "deprivation" under the statute's penalty scheme only *after* it has been afforded a full evidentiary hearing and appeal rights. See 30 U.S.C. 815(a) and (d), 820(i) and (j), 823(d)(2)(A)(i).

[24] Petitioner exaggerates the threat of daily penalties under the Act to which it may be subject in this case. See Pet. Br. 30; see also American Mining Cong. Amici Br. 22. Testimony of MSHA officials contradicts petitioner's claim (Br. 7 n.11) that such penalties would have inevitably been sought in this case. J.A. 48. Moreover, petitioner mischaracterizes (Br. 6, 33) the events in *Kerr-McGee*. There, after MSHA issued a citation to the operator for failing to post the designation of representatives, MSHA's District Manager simply informed the operator that he would "recommend implementation of a civil penalty, under [30 U.S.C. 820(b)] for each day" that the operator failed to abate the violation. J.A. 42-43. Moreover, the record indicates that if Kerr-McGee had sought an expedited hearing before the Commission, MSHA might not have sought daily penalties while that challenge was pending. See J.A. 37.

therefore imposes no pre-hearing deprivation of any sort on a mine operator.[25]

A mine operator unwilling to take the risk that it will lose on the merits of its challenge to a citation has the option to abate the violation pending the outcome of the administrative and judicial process, thereby preventing any occasion for assessment of daily penalties. On the facts of this case, if MSHA had issued a citation, abatement would have consisted entirely of posting the designation of miners' representatives at the mine, pursuant to 30 C.F.R. 40.4. Only if an inspection occurred during the pendency of the administrative process would the union even be in a position to engage in the organizing activities about which petitioner speculates. Even then petitioner could seek procedural protections. The Mine Safety Act itself authorizes the Commission to grant temporary relief from MSHA orders in certain circumstances, see 30 U.S.C. 815(b)(2), and Commission rules provide for expedited hearings on challenges to MSHA citations on as little as four days' notice, or even earlier if all parties consent. See 29 C.F.R. 2700.52. Finally, an operator may seek temporary relief from the court of appeals. See 30 U.S.C. 816(a)(3). See also *TRAC*, 750 F.2d at 72, 78-79.

[25] Even if there were some pre-hearing deprivation by virtue of the potential for incurring civil penalties while the administrative process runs its course, such a deprivation would be present in *every* enforcement dispute under the Mine Safety Act. There is no logical reason why an operator contesting a citation based on an asserted "conflict" with another federal statute should be permitted to sue in the district court, while an operator contesting a citation on the ground that it conflicts with the Mine Safety Act should be required to adhere to the statutory review process. Petitioner's claim here therefore amounts to a frontal assault on the Act's administrative review scheme. The Act's review scheme, however, is equally adequate in both instances. As this Court has recognized, the safety issues peculiar to the mining industry justify extensive regulation, and mine operators are on notice that their property interests are subject to substantial intrusions to protect the health and safety of miners. See *Donovan* v. *Dewey*, 452 U.S. 594, 603 (1981). The procedural mechanisms protecting health and safety are important regardless of the ground on which the underlying agency action is being challenged.

Thus, petitioner's claim fails to meet even the threshold requirement for a due process claim—that the agency conduct at issue deprived it of a protected interest prior to any hearing. Even if that condition were thought to be satisfied by virtue of MSHA's mere proposal of penalties, however, petitioner's due process claim would nonetheless be without merit, because any such "deprivation" could be cured through post-hearing procedures. It is plain that the mere prospect of the future assessment of monetary penalties is not the sort of irreparable injury that requires a pre-deprivation hearing. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 244 (1980); see also *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 611 (1974) (where only property interests are involved, postponement of hearing does not deny due process if adequate review is ultimately provided); *Phillips* v. *Commissioner*, 283 U.S. 589, 596-597 (1931); *Mackey* v. *Montrym*, 443 U.S. 1, 13 (1979). In this case, as in *Eldridge*, the opportunity for a post-"deprivation" hearing "fully comport[s] with due process." *Eldridge*, 424 U.S. at 349.[26]

[26] Even assuming, moreover, that the presence at its mine of a miners' representative who is a union employee would impinge upon a property interest of petitioner, such an injury is plainly not "irreparable" in any constitutionally significant sense. As the court of appeals held (Pet. App. 14), there is no reason to believe that representatives acting within the scope of the Mine Safety Act would cause petitioner irreparable harm, or that MSHA officials would permit them to abuse their Mine Safety Act rights during the course of an inspection. See *Kerr-McGee*, 15 F.M.S.H.R.C. at 361-362. The Commission has consistently recognized the limits on the role of miners' representatives under the Act. See *Council of S. Mountains, Inc.* v. *Martin County Coal Corp.*, 6 F.M.S.H.R.C. 206 (1984), aff'd, 751 F.2d 1418 (D.C. Cir. 1985); *United Mine Workers* v. *Secretary of Labor*, 5 F.M.S.H.R.C. 807 (1983), aff'd, 725 F.2d

Finally, relying on this Court's decision in *Eldridge*, petitioner seeks to characterize its due process claim as "collateral" to the merits of the underlying dispute, and therefore subject to judicial review on that ground. See Pet. Br. 35, 40. In *Eldridge*, however, the Court recognized that the plaintiff claimed that he would be harmed by the denial of a pre-deprivation hearing "in a way not recompensable through retroactive" relief. 424 U.S. at 331. As we have shown, that is not the case here.[27] In substance, petitioner's due process claim is nothing more than a label attached to a garden-variety objection to a citation as inconsistent with the statute, in an effort to circumvent the statutory review process. As it has in the past, this Court should reject that effort, especially since no citation has yet been issued. See *Ringer*, 466 U.S. at 614; *MCorp Financial, Inc.*, 112 S. Ct. at 464-466; *ITT World Communications, Inc.*, 466 U.S. at 468. If a citation should be issued at a later date—and if petitioner believes at that time that it will be irreparably injured—it could seek an expedited hearing before the Commission. If that request were denied—and if petitioner believed that the denial constituted a "collateral order"—it then could seek judicial review in the court of appeals under the rationale of *Eldridge* that petitioner invokes. See *Jim Walter Resources, Inc.* v. *Federal Mine Safety & Health Review Comm'n*, 920 F.2d 738 (11th Cir. 1990). In no event, however, would review lie in the district court.

126 (D.C. Cir. 1984) (Table); *United Mine Workers* v. *Secretary of Labor*, 5 F.M.S.H.R.C. 1519 (1983).

[27] Petitioner contends (Br. 24-25) that its constitutional claim is at least "colorable" and that the district court therefore had jurisdiction, even if only to reject its claim. As we have shown, however, petitioner's due process claims are "patently without merit," *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 70 (1978) (emphasis omitted), and thus are subject to dismissal "for want of jurisdiction." *Ibid.* See also *Ringer*, 466 U.S. at 608 n.4; *Hagans* v. *Lavine*, 415 U.S. 528, 536-538 (1974).

II. EVEN IF THE DISTRICT COURT WAS NOT FORECLOSED FROM EXERCISING JURISDICTION, IT NEVERTHELESS WAS REQUIRED TO DISMISS THE COMPLAINT

Even if the district court was not altogether precluded from exercising jurisdiction in this case, it was required to dismiss the complaint because petitioner has no cause of action, its claims are not ripe for judicial review, and administrative remedies have not been exhausted.

A. Petitioner Has No Cause Of Action

Petitioner's complaint did not specify the source of its cause of action against respondents. Although petitioner invoked the district court's federal question jurisdiction under 28 U.S.C. 1331 (see J.A. 6), that statute "does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 249 (1951).[28] Accordingly, petitioner must look elsewhere to find a basis for its suit.

Although petitioner's complaint and brief in this Court both fail to identify any federal statute creating a cause

[28] Although petitioner notes (Br. 2) that it also invoked the Declaratory Judgment Act, 28 U.S.C. 2201-2202, as a basis for this suit (see J.A. 6), "the operation of the Declaratory Judgment Act is procedural only." *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240 (1937). It only "authorizes relief," *ibid.*, in the nature of a "declar[ation] [of] the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. 2201(a). This Court long ago held that "the declaratory judgment procedure will not be used to pre-empt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review." *Public Service Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 246 (1952). "Responsibility for effective functioning of the administrative process cannot be thus transferred from the bodies in which Congress has placed it to the courts." *Id.* at 246-247; see also *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950).

of action, it is plain that any cause of action petitioner may have must stem from the APA. Section 10(a) of the APA, 5 U.S.C. 702, provides for judicial review at the behest of persons "suffering legal wrong because of agency action" or who are "adversely affected or aggrieved by agency action within the meaning of a relevant statute." Section 10(b) of the APA, 5 U.S.C. 703, then sets forth the form and venue of the cause of action created in Section 10(a). Section 10(b) requires that judicial review of agency action generally proceed pursuant to "the special statutory review proceeding relevant to the subject matter in a court specified by statute." 5 U.S.C. 703. In this case, of course, Congress has provided an elaborate and comprehensive administrative review scheme followed by a right of judicial review in the court of appeals. If a statute's special review procedures are inadequate, Section 10(b) provides that the cause of action created in Section 10(a) may be brought in district court. 5 U.S.C. 703. As we have shown above (see pp. 29-35, *supra*), the judicial review provisions of the Mine Safety Act are fully adequate. It follows that petitioner's APA cause of action lies only in the court of appeals, pursuant to the Mine Safety Act.

Moreover, Section 10(c) of the APA limits judicial review to "final agency action." 5 U.S.C. 704; see *Darby* v. *Cisneros*, No. 91-2045 (June 21, 1993), slip op. 6-7; *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 890-894 (1990). In this case, MSHA has not taken any final action with respect to petitioner. Petitioner's challenge is not to the facial validity of the regulatory definition of "representative" in 30 C.F.R. 40.1(b)(1). It challenges only an administrative interpretation of that regulation, communicated to it by MSHA's District Manager, under which union personnel may act as miners' representatives.[29] MSHA has not even issued a citation or otherwise instituted enforcement action against petitioner based on that interpretation. And even if MSHA *had* issued a citation and proposed a penalty, neither would constitute final agency action subject to review under the APA, *Standard Oil Co.*, 449 U.S. at 239-243, since each would (at petitioner's request) be subject to independent review by the Commission before any action by the government against petitioner could become administratively final. See *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2773-2775 (1992).[30] Thus, the district court was required to dismiss the complaint because there has been no final agency action in this case that may be challenged in a cause of action under the APA.

[29] Petitioner refers to *MSHA's* "designation" of miners' representatives as agency action that is subject to judicial review. Under the governing regulations, however, it is the employees themselves who designate" a miners' representative, without any requirement for advance approval by MSHA. 30 C.F.R. Pt. 40.

[30] If petitioner did not seek Commission review, "the citation and the proposed assessment of penalty [would] be deemed a final order of the Commission and not subject to review by any court or agency." 30 U.S.C. 815(a).

B. Petitioner's Claims Are Not Ripe For Judicial Review

Even if petitioner were challenging "final agency action" subject to review under the APA, it may not obtain injunctive or declaratory relief unless the controversy concerning designation of miners' representatives is ripe for judicial review. *Reno* v. *Catholic Social Services, Inc.*, slip op. 12-14. Petitioner contends (Br. 37-38) that its anticipation of enforcement action in the form of a citation for failure to post the designation of miners' representatives renders the controversy ripe for judicial review. The question of ripeness depends upon "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories*, 387 U.S. at 149. Contrary to petitioner's view, neither condition is met here.

First, the issues raised by petitioner are not presently fit for judicial review. The case does not raise "purely legal" issues. *Abbott Laboratories*, 387 U.S. at 149.[31] Petitioner asserts that UMWA employees, acting as miners' representatives under the Mine Safety Act, will impermissibly engage in organizing activity in contravention of the NLRA. That is a factual question about which no record has been developed. So too is the question whether there is undue danger that the representatives might gain an organizing advantage by virtue of performing their legitimate role under the Mine Safety Act. The district court has no experience with, or expertise in, the manner in which mine inspections are conducted, the role of representatives in those inspections, the nature and scope of information regarding the mine operator and its employees to which representatives are given access, as well as a host of other technical issues.

Such questions are, by contrast, within the everyday experience of the Commission. The development of a factual record therefore should take place in that forum, after MSHA has instituted enforcement action through issuance of a citation arising out of a particular refusal by petitioner to respect its employees' choice of representatives. At that point, of course, a plaintiff that sought to rely on the issuance of a citation or a proposed penalty to satisfy the ripeness requirement would then still find itself barred by the Mine Safety Act's provisions providing an exclusive avenue for review by the Commission and then the courts of appeals. "The ripeness doctrine and the

[31] The Court stressed in *Abbott Laboratories* that the plaintiffs challenged final agency action, 387 U.S. at 140-141, 148, and it held that the ripeness doctrine did not pose an independent bar to judicial review. Here, by contrast, there is no final agency action, and petitioner seeks to rely on general notions of "ripeness" to overcome that defect. The requirement of "final agency action" stems directly from the text of the APA, however, and it cannot be dispensed with by the courts in the manner petitioner proposes.

[Mine Safety Act's] jurisdictional provisions would thus dovetail neatly, and not necessarily by mere coincidence." *Reno* v. *Catholic Social Services, Inc.*, slip op. 17.

Second, this is not "a case in which the impact of [agency action] upon the petitioner[] is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Abbott Laboratories*, 387 U.S. at 152. Unlike the situation in *Abbott Laboratories* and its companion case, *Gardner* v. *Toilet Goods Ass'n*, *supra*, petitioner is not now placed in a "quandary," *Toilet Goods Ass'n*, 387 U.S. at 172; see also *Abbott Laboratories*, 387 U.S. at 153, between having to "make significant changes in [its] everyday business practices," *id.* at 154, and "expos[ure] to the imposition of strong sanctions," *ibid.*, if it chooses noncompliance. See *Toilet Goods Ass'n*, 387 U.S. at 172-173. Compliance with the challenged regulation (or abatement of a citation) would only require petitioner to post the notice designating the miners' representatives, which manifestly does not entail wholesale changes in petitioner's business practices. Even if an inspection occurred prior to resolution of its administrative challenge, permitting the designated representatives to aid in such an inspection would not result in any palpable cost to petitioner, especially since the MSHA inspector is responsible for ensuring that miners' representatives do not engage in any activities unrelated to their Mine Safety Act duties while they are at the mine. J.A. 49-50. Thus, any impact on petitioner's operations is a far cry from the "hardship" this Court recognized as characterizing a ripe controversy in *Abbott Laboratories*. See 387 U.S. at 152 ("If petitioners wish to comply they must change all their labels, advertisements, and promotional materials; they must destroy stocks of printed matter; and they must invest heavily in new printing type and new supplies.").

For the foregoing reasons, the instant controversy is not ripe, and the suit should be dismissed for this reason

as well. Indeed, in closely analogous circumstances—and in a case decided together with *Abbott Laboratories*—this Court held that a challenge to a regulation governing access by government inspectors to a manufacturer's premises was not ripe, both because the legal challenge might depend on the factual context in which entry was sought and refused, and because the manufacturer would not suffer substantial injury if judicial review was postponed. See *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 158, 163-166 (1967).

C. Administrative Procedures Have Not Been Exhausted

Finally, and in a related vein, this case must be dismissed under principles governing exhaustion of administrative remedies. As we have explained, the Commission has the power and competence to decide the issues presented by petitioner. Petitioner errs in contending (Br. 37, 40-41) that the agency's review procedures are inadequate and that exhaustion is therefore unnecessary in this case.

The exhaustion doctrine "provides 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *McKart* v. *United States*, 395 U.S. 185, 193 (1969), quoting *Myers*, 303 U.S. at 50-51; accord *Whitney Nat'l Bank*, 379 U.S. at 419-422. The doctrine's several purposes include preventing "premature interference with agency processes," allowing the agency to "function efficiently" and "correct its own errors," providing "the parties and the courts the benefit of [agency] experience and expertise," and assuring the development of an "adequate" record. *Salfi*, 422 U.S. at 765; accord *Ringer*, 466 U.S. at 619 n.12; *McKart*, 395 U.S. at 193-194.

In this case, those purposes would be well served by requiring resort to the Mine Safety Act's "extensive review process." Pet. App. 5. The gravamen of petitioner's

complaint is that the mere presence of union personnel during inspections will severely harm its interests. The Commission's knowledge of the day-to-day workings of mines, as well as its expertise in understanding and determining the nature and scope of miners' representatives' duties and powers under the Mine Safety Act, makes it particularly important that the issues petitioner raises first be presented to the Commission. A contrary result would directly undermine Congress's determination that the Commission is to serve as the "ultimate administrative review body for disputed cases arising under the [Act]." S. Rep. No. 181, *supra*, at 13.[32] As a "quasi-judicial agency" that is independent of the Secretary and "has no enforcement responsibilities," *Brock* v. *Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986), the Commission is uniquely situated to engage in independent scrutiny of MSHA's actions in advance of judicial review.

There is no merit to petitioner's claim that resolution of the issues in this case will not benefit from administrative consideration. The Commission's decision in *Kerr-McGee Coal Corp.* v. *Secretary of Labor*, *supra*, belies any contention that the Commission cannot consider the purported conflict between the Mine Safety Act and the NLRA, and unlike the situation in *Reiter* v. *Cooper*, 113 S. Ct. 1213, 1221 (1993), the Commission has never disavowed its authority to do so. Petitioner's argument that exhaustion would be futile (Br. 41 & n.40) ignores the fact that the Commission is free to

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[32] As we explained (see pp. 34-40, *supra*), the statutory procedures are plainly adequate to protect petitioner's due process interests, and petitioner lacks even a colorable claim that it will be deprived of a liberty or property interest that cannot be cured through a post-hearing remedy. *Eldridge*, 424 U.S. at 330-331. There is therefore no merit to petitioner's contention (Br. 40-41) that the requirement of exhaustion should be excused because its challenge is to the adequacy of the administrative procedures for which immediate review is necessary to avoid irreparable harm. See Pet. Br. 41, citing *Bowen* v. *City of New York*, 476 U.S. 467 (1986), and *Barry* v. *Barchi*, 443 U.S. 55, 63 n.10 (1979).

refine its approach on a case-by-case basis, and that review by the Commission would provide an opportunity for development of a record on which petitioner's legal objections may be considered by a court of appeals. Similarly, there is no danger here, as there was in *Coit Independence Joint Venture* v. *Federal Sav. & Loan Ins. Corp.*, 489 U.S. 561, 586-587 (1989), that the duration of agency procedures will threaten to moot claims that petitioner may have in another forum. Thus, none of the "well-established exceptions to the exhaustion doctrine" (Br. 41) is applicable here, and there is no reason to excuse petitioner from first presenting its contentions to the Commission—after receiving a citation—before seeking judicial review.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JULY 1993

APPENDIX

Relevant Provisions of Title 30, United States Code

§ 801. Congressional findings and declaration of purpose

Congress declares that—

(a) the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner;

(b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal or other mines cause grief and suffering to the miners and to their families;

(c) there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;

(d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines is a serious impediment to the future growth of the coal or other mining industry and cannot be tolerated;

(e) the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines;

(f) the disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally

caused diseases unduly impedes and burdens commerce; and

(g) it is the purpose of this chapter (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health and Human Services and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal or other miners; (2) to require that each operator of a coal or other mine and every miner in such mine comply with such standards; (3) to cooperate with, and provide assistance to, the States in the development and enforcement of effective State coal or other mine health and safety programs; and (4) to improve and expand, in cooperation with the States and the coal or other mining industry, research and development and training programs aimed at preventing coal or other mine accidents and occupationally caused diseases in the industry.

* * * * *

§ 813. Inspections, investigations, and recordkeeping

(a) Purposes; advance notice; frequency; guidelines; right of access

Authorized representatives of the Secretary or the Secretary of Health and Human Services shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety

standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this subchapter or other requirements of this chapter. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health and Human Services may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this chapter, and his experience under this chapter and other health and safety laws. For the purpose of making any inspection or investigation under this chapter, the Secretary, or the Secretary of Health and Human Services, with respect to fulfilling his responsibilities under this chapter, or any authorized representative of the Secretary or the Secretary of Health and Human Services, shall have a right of entry to, upon, or through any coal or other mine.

(b) Notice and hearing; subpoenas; witnesses; contempt

For the purpose of making any investigation of any accident or other occurrence relating to health

or safety in a coal or other mine, the Secretary may, after notice, hold public hearings, and may sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpoena served upon any person under this section, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Secretary or to appear and produce documents before the Secretary, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

* * * * *

(e) Collecting information without unreasonable burden on operators

Any information obtained by the Secretary or by the Secretary of Health and Human Services under this chapter shall be obtained in such a manner as not to impose an unreasonable burden upon operators, especially those operating small businesses, consistent with the underlying purposes of this chapter. Unnecessary duplication of effort in obtaining information shall be reduced to the maximum extent feasible.

(f) Participation of representatives of operators and miners in inspections

Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a) of this section, for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

(g) Immediate inspection; notice of violation or danger; determination

(1) Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this chapter or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this subchapter. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

(2) Prior to or during any inspection of a coal or other mine, any representative of miners or a miner in the case of a coal or other mine where there is no such representative, may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this chapter or of any imminent danger

which he has reason to believe exists in such mine. The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation or order with respect to such danger and shall furnish the representative of miners or miner requesting such review a written statement of the reasons for the Secretary's final disposition of the case.

(h) Records and reports; compilation and publication; availability

In addition to such records as are specifically required by this chapter, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary or the Secretary of Health and Human Services may reasonably require from time to time to enable him to perform his functions under this chapter. The Secretary or the Secretary of Health and Human Services is authorized to compile, analyze, and publish, either in summary or detailed form, such reports or information so obtained. Except to the extent otherwise specifically provided by this chapter, all records, information, reports, findings, citations, notices, orders, or decisions required or issued pursuant to or under this chapter may be published from time to time, may be released to any interested person, and shall be made available for public inspection.

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§ 814. Citations and orders

(a) Issuance and form of citations; prompt issuance

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

(b) Follow-up inspections; findings

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) of this section has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection

(c) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(c) Exempt persons

The following persons shall not be required to be withdrawn from, or prohibited from entering, any area of the coal or other mine subject to an order issued under this section:

(1) any person whose presence in such area is necessary, in the judgment of the operator or an authorized representative of the Secretary, to eliminate the condition described in the order;

(2) any public official whose official duties require him to enter such area;

(3) any representative of the miners in such mine who is, in the judgment of the operator or an authorized representative of the Secretary, qualified to make such mine examinations or who is accompanied by such a person and whose presence in such area is necessary for the investigation of the conditions described in the order; and

(4) any consultant to any of the foregoing.

(d) Findings of violations; withdrawal order

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially con-

tribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this chapter. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

(e) Pattern of violations; abatement; termination of pattern

(1) If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine health or safety hazard. The withdrawal order shall remain in effect until an authorized representative of the Secretary determines that such violation has been abated.

(3) If, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine health and safety hazard, the pattern of violations that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraphs (1) and (2) shall no longer apply. However, if as a result of subsequent violations, the operator reestablishes a pattern of violations, paragraphs (1) and (2) shall again be applicable to such operator.

(4) The Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists.

* * * * *

(h) Duration of citations and orders

Any citation or order issued under this section shall remain in effect until modified, terminated or vacated by the Secretary or his authorized representative, or modified, terminated or vacated by the Secretary or his authorized representative, or modified, terminated or vacated by the Commission or the courts pursuant to section 815 or 816 of this title.

§ 815. Procedure for enforcement

(a) Notification of civil penalty; contest

If, after an inspection or investigation, the Secretary issues a citation or order under section 814 of this title, he shall, within a reasonable time after the termination of such inspection or investigation, notify

the operator by certified mail of the civil penalty proposed to be assessed under section 820(a) of this title for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. A copy of such notification shall be sent by mail to the representative of miners in such mine. If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency. Refusal by the operator or his agent to accept certified mail containing a citation and proposed assessment of penalty under this subsection shall constitute receipt thereof within the meaning of this subsection.

(b) Failure of operator to correct violation; notification; contest; temporary relief

(1)(A) If the Secretary has reason to believe that an operator has failed to correct a violation for which a citation has been issued within the period permitted for its correction, the Secretary shall notify the operator by certified mail of such failure and of the penalty proposed to be assessed under section 820(b) of this title by reason of such failure and that the operator has 30 days within which to notify the Secretary that he wishes to contest the Secretary's notification of the proposed assessment of penalty. A copy of such notification of the proposed assessment of penalty shall at the same time be sent by mail to the

representative of the mine employees. If, within 30 days from the receipt of notification of proposed assessment of penalty issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the notification of proposed assessment of penalty, such notification shall be deemed a final order of the Commission and not subject to review by any court or agency. Refusal by the operator or his agent to accept certified mail containing a notification of proposed assessment of penalty issued under this subsection shall constitute receipt thereof within the meaning of this subsection.

(B) In determining whether to propose a penalty to be assessed under section 820(b) of this title, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

(2) An applicant may file with the Commission a written request that the Commission grant temporary relief from any modification or termination of any order or from any order issued under section 814 of this title together with a detailed statement giving the reasons for granting such relief. The Commission may grant such relief under such conditions as it may prescribe, if—

(A) a hearing has been held in which all parties were given an opportunity to be heard;

(B) the applicant shows that there is substantial likelihood that the findings of the Commission will be favorable to the applicant; and

(C) such relief will not adversely affect the health and safety of miners.

No temporary relief shall be granted in the case of a citation issued under subsection (a) or (f) of section 814 of this title. The Commission shall provide a procedure for expedited consideration of applications for temporary relief under this paragraph.

(c) Discrimination or interference prohibited; complaint; investigation; determination; hearing

(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of him-

self or others of any statutory right afforded by this chapter.

(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5 but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to

take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to his paragraph.

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5 but without regard to subsection (a)(3) of such section), and thereafter shall issue an order based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees)

as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 816 of this title. Violations by any person of paragraph (1) shall be subject to the provisions of sections 818 and 820(a) of this title.

(d) Contest proceedings; hearings; findings; of fact; affirmance, modification, or vacatur of citation, order, or proposed penalty; procedure before Commission

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 814 of this title, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 814 of this title, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 814 of this title, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 814 of this title, the Secretary shall immediately advise the Commission

of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 814 of this title.

§ 816. Judicial review of Commission orders

(a) Petition by person adversely affected or aggrieved; temporary relief

(1) Any person adversely affected or aggrieved by an order of the Commission issued under this chapter may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit, by filing in such court within 30 days following the issuance of such order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of title 28.

Upon such filing, the court shall have exclusive jurisdiction of the proceeding and of the questions determined therein, and shall have the power to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside, in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Commission may modify or set aside its original order by reason of such modified or new findings of fact. Upon the filing of the record after such remand proceedings, the jurisdiction of the court shall be exclusive and its judgment and degree shall be final,

except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of title 28.

(2) In the case of a proceeding to review any order or decision issued by the Commission under this chapter, except an order or decision pertaining to an order issued under section 817(a) of this title or an order or decision pertaining to a citation issued under section 814(a) or (f) of this title, the court may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceeding, if—

(A) all parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief;

(B) the person requesting such relief shows that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding; and

(C) such relief will not adversely affect the health and safety of miners in the coal or other mine.

(3) In the case of a proceeding to review any order or decision issued by the Panel under this chapter, the court may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceeding, if—

(A) all parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief; and

(B) the person requesting such relief shows that there is a substantial likelihood that he will

prevail on the merits of the final determination of the proceeding.

(b) Petition by Secretary for review or enforcement of final Commission orders

The Secretary may also obtain review or enforcement of any final order of the Commission by filing a petition for such relief in the United States court of appeals for the circuit in which the alleged violation occurred or in the Court of Appeals for the District of Columbia Circuit, and the provisions of subsection (a) shall govern such proceedings to the extent applicable. If no petition for review, as provided in subsection (a) of this section, is filed within 30 days after issuance of the Commission's order, the Commission's findings of fact and order shall be conclusive in connection with any petition for enforcement which is filed by the Secretary after the expiration of such 30-day period. In any such case, as well as in the case of a non-contested citation or notification by the Secretary which has become a final order of the Commission under subsection (a) or (b) of section 815 of this title, the clerk of the court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary and the operator named in the petition. In any contempt proceeding brought to enforce a decree of a court of appeals entered pursuant to this subsection or subsection (a) of this section, the court of appeals may assess the penalties provided in section 820 of this title, in addition to invoking any other available remedies.

(c) Stay of order or decision of Commission or Panel

The commencement of a proceeding under this section shall not, unless specifically ordered by the court, operate as a stay of the order or decision of the Commission or the Panel.

* * * * *

§ 818. Injunctions

(a) Civil action by Secretary

(1) The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent—

(A) violates or fails or refuses to comply with any order or decision issued under this chapter,

(B) interferes with, hinders, or delays the Secretary or his authorized representative, or the Secretary of Health and Human Services or his authorized representative, in carrying out the provisions of this chapter,

(C) refuses to admit such representatives to the coal or other mine,

(D) refuses to permit the inspection of the coal or other mine, or the investigation of an accident or occupational disease occuring in, or connected with, such mine,

(E) refuses to furnish any information or report requested by the Secretary or the Secretary of Health and Human Services in furtherance of the provisions of this chapter, or

(F) refuses to permit access to, and copying of, such records as the Secretary or the Secretary of Health and Human Services determines necessary in carrying out the provisions of this chapter.

(2) The Secretary may institute a civil action for relief, including permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the coal or other mine is located or in which the operator of such mine has his principal office whenever the Secretary believes that the operator of a coal or other mine is engaged in a pattern of violation of the mandatory health or safety standards of this chapter, which in the judgment of the Secretary constitutes a continuing hazard to the health or safety of miners.

(b) Jurisdiction; relief; findings of Commission or Secretary

In any action brought under subsection (a) of this section, the court shall have jurisdiction to provide such relief as may be appropriate. In the case of an action under subsection (a)(2) of this section, the court shall in its order require such assurance or affirmative steps as it deems necessary to assure itself that the protection afforded to miners under this chapter shall be provided by the operator. Temporary restraining orders shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure, as amended, except that the time limit in such orders, when issued without notice, shall be seven days from the date of entry. Except as otherwise provided herein, any relief granted by the court to enforce any order under paragraph (1) of subsection (a) of this section shall continue in effect until the completion or final termination of all proceedings for review of such order under this subchapter, unless prior thereto, the district court granting such relief sets it aside or modifies it. In any action instituted under this section to enforce an order or decision issued by the Commission or the Secretary after a public hearing in accordance with section 554 of title 5, the findings of the Commission or the Secretary, as the case may be, if supported by substantial evidence on the record considered as a whole, shall be conclusive.

§ 819. Posting of orders and decisions

(a) Mine office; bulletin board

At each coal or other mine there shall be maintained an office with a conspicuous sign designating it as the office of such mine. There shall be a bulletin board at such office or located at a conspicuous place near an entrance of such mine, in such manner that orders, citations, notice and decisions required by law or regulation to be posted, may be posted thereon, and be easily visible to all persons desiring to read them, and be protected against damage by weather and against unauthorized removal. A copy of any order, citation, notice or decision required by this chapter to be given to an operator shall be delivered to the office of the affected mine, and a copy shall be immediately posted on the bulletin board of such mine by the operator or his agent.

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(b) Distribution of orders, citations, notices, and decisions

The Secretary shall (1) cause a copy of any order, citation, notice, or decision required by this chapter to be given to an operator to be mailed immediately to a representative of the miners in the affected coal or other mine, and (2) cause a copy thereof to be mailed to the public official or agency of the State charged with administering State laws, if any, relating to health or safety in such mine. Such notice, order, citation, or decision shall be available for public inspection.

(c) Compliance

In order to insure prompt compliance with any notice, order, citation, or decision issued under this chapter, the authorized representative of the Secretary may deliver such notice, order, citation, or decision to an agent of the operator, and such agent shall immediately take appropriate measures to insure compliance with such notice, order, citation, or decision.

(d) Filing; designation of health and safety officers

Each operator of a coal or other mine subject to this chapter shall file with the Secretary the name and address of such mine and the name and address of the person who controls or operates the mine. Any revisions in such names or addresses shall be promptly filed with the Secretary. Each operator of a coal or other mine subject to this chapter shall designate a responsible official at such mine as the principal officer in charge of health and safety at such

mine, and such official shall receive a copy of any notice, order, citation, or decision issued under this chapter affecting such mine. In any case where the mine is subject to the control of any person not directly involved in the daily operations of the coal or other mine, there shall be filed with the Secretary the name and address of such person and the name and address of a principal official of such person who shall have overall responsibility for the conduct of an effective health and safety program at any coal or other mine subject to the control of such person, and such official shall receive a copy of any notice, order, citation, or decision issued affecting any such mine. The mere designation of a health and safety official under this subsection shall not be construed as making such official subject to any penalty under this chapter.

§ 820. Penalties

(a) Civil penalty for violation of mandatory health or safety standards

The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this chapter, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $50,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

(b) Civil penalty for failure to correct violation for which citation has been issued

Any operator who fails to correct a violation for which a citation has been issued under section 814(a)

of this title within the period permitted for its correction may be assessed a civil penalty of not more than $5,000 for each day during which such failure or violation continues.

(c) Liability of corporate directors, officers, and agents

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this chapter or any order incorporated in a final decision issued under this chapter, except an order incorporated in a decision issued under subsection (a) of this section or section 815(c) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

(d) Criminal penalties

Any operator who willfully violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under section 814 of this title and section 817 of this title, or any order incorporated in a final decision issued under this subchapter, except an order incorporated in a decision under subsection (a) of this section or section 815(c) of this title, shall, upon conviction, be punished by a fine of not more than $25,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for

a violation committed after the first conviction of such operator under this chapter, punishment shall be by a fine of not more than $50,000, or by imprisonment for not more than five years, or both.

(e) Unauthorized advance notice of inspections

Unless otherwise authorized by this chapter, any person who gives advance notice of any inspection to be conducted under this chapter shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or both.

* * * * *

(i) Authority to assess civil penalties

The Commission shall have authority to assess all civil penalties provided in this chapter. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

(j) Payment of penalties; interest

Civil penalties owed under this chapter shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United

States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation occurred or where the operator has its principal office. Interest at the rate of 8 percent per annum shall be charged against a person on any final order of the Commission, or the court. Interest shall begin to accrue 30 days after the issuance of such order.

(k) Compromise, mitigation, and settlement of penalty

No proposed penalty which has been contested before the Commission under section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court.

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§ 823. Federal Mine Safety and Health Review Commission

(a) Establishment; membership; chairman

The Federal Mine Safety and Health Review Commission is hereby established. The Commission shall consist of five members, appointed by the President by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this chapter. The President shall designate one of the members of the Commission to serve as Chairman.

(b) Terms; personnel; administrative law judges

(1) The terms of the members of the Commission shall be six years, except that—

(A) members of the Commission first taking office after November 9, 1977, shall serve, as designated by the President at the time of appointment, one for a term of two years, two for a term of four years and two for a term of six years; and

(B) a vacancy caused by the death, resignation, or removal of any member prior to the expiration of the term for which he was appointed shall be filled only for the remainder of such unexpired term.

Any member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

(2) The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission. The Commission shall appoint such employees as it deems necessary to assist in the performance of the Commission's functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, relating to classification and general pay rates. Upon the effective date of the Federal Mine Safety and Health Amendments Act of 1977, the administrative law judges assigned to the Arlington, Virginia, facility of the Office of Hearings and Appeals, United States Department of the Interior, shall be automatically transferred in grade and position to the Federal Mine Safety and Health Review Commission. Notwithstanding the provisions of section 559 of title 5, the incumbent Chief Administrative

Law Judge of the Office of Hearings and Appeals of the Department of the Interior assigned to the Arlington, Virginia facility shall have the option, on the effective date of the Federal Mine Safety and Health Amendments Act of 1977, of transferring to the Commission as an administrative law judge, in the same grade and position as the other administrative law judges. The administrative law judges (except those presiding over Indian Probate Matters) assigned to the Western facilities of the Office of Hearings and Appeals of the Department of the Interior shall remain with that Department at their present grade and position or they shall have the right to transfer on an equivalent basis to that extended in this paragraph to the Arlington, Virginia administrative law judges in accordance with procedures established by the Director of the Office of Personnel Management. The Commission shall appoint such additional administrative law judges as it deems necessary to carry out the functions of the Commission. Assignment, removal, and compensation of administrative law judges shall be in accordance with sections 3105, 3344, 5362 and 7521 of title 5.

(c) Delegation of powers

The Commission is authorized to delegate to any group of three or more members any or all of the powers of the Commission, except that two members shall constitute a quorum of any group designated pursuant to this paragraph.

(d) Proceedings before administrative law judge; administrative review

(1) An administrative law judge appointed by the Commission to hear matters under this chapter shall

hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such administrative law judge by the chief administrative law judge of the Commission or by the Commission; and shall make a decision which constitutes his final disposition of the proceedings. The decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission in accordance with paragraph (2). An administrative law judge shall not be assigned to prepare a recommended decision under this chapter.

(2) The Commission shall prescribe rules of procedure for its review of the decisions of administrative law judges in cases under this chapter which shall meet the following standards for review:

(A) (i) Any person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision. Review by the Commission shall not be a matter of right but of the sound discretion of the Commission.

(ii) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

(I) A finding or conclusion of material fact is not supported by substantial evidence.

(II) A necessary legal conclusion is erroneous.

(III) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission.

(IV) A substantial question of law, policy or discretion is involved.

(V) A prejudicial error or procedure was committed.

(iii) Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record when assignments of error are based on the record, and by statutes, regulations, or principal authorities relied upon. Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass. Review by the Commission shall be granted only by affirmative vote of two of the Commissioners present and voting. If granted, review shall be limited to the questions raised by the petition.

(B) At any time within 30 days after the issuance of a decision of an administrative law judge, the Commission may in its discretion (by affirmative vote of two of the Commissioners present and voting) order the case before it for review but only upon the ground that the decision may be contrary to law or Commission policy, or that a novel question of policy has been presented. The Commission shall state in such order the specific issue of law, Commission policy, or novel question of policy involved. If a party's petition for discretionary review has been granted, the Commission shall not raise or consider additional issues in such review proceedings except in compliance with the requirements of this paragraph.

(C) For the purpose of review by the Commission under paragraph (A) or (B) of this subsection, the record shall include: (i) all matters constituting the record upon which the decision of the administrative law judge was based; (ii) the rulings upon proposed

findings and conclusions; (iii) the decision of the administrative law judge; (iv) the petition or petitions for discretionary review, responses thereto, and the Commission's order for review; and (v) briefs filed on review. No other material shall be considered by the Commission upon review. The Commission either may remand the case to the administrative law judge for further proceedings as it may direct or it may affirm, set aside, or modify the decision or order of the administrative law judge in conformity with the record. If the Commission determines that further evidence is necessary on an issue of fact it shall remand the case for further proceedings before the administrative law judge.

(The provisions of section 557(b) of title 5 with regard to the review authority of the Commission are expressly superseded to the extent that they are inconsistent with the provisions of subparagraphs (A), (B), and (C) of this paragraph.)

(e) Witnesses and evidence; subpoenas; contempt

In connection with hearings before the Commission or its administrative law judges under this chapter, the Commission and its administrative law judges may compel the attendance and testimony of witnesses and the production of books, papers, or documents, or objects, and order testimony to be taken by deposition at any stage of the proceedings before them. Any person may be compelled to appear and depose and produce similar documentary or physical evidence, in the same manner as witnesses may be compelled to appear and produce evidence before the Commission and its administrative law judges. Witnesses shall be paid the same fees and mileage that

are paid witnesses in the courts of the United States and at depositions ordered by such courts. In case of contumacy, failure, or refusal of any person to obey a subpoena or order of the Commission or an administrative law judge, respectively, to appear, to testify, or to produce documentary or physical evidence, any district court of the United States or the United States courts of any territory or possession, within the jurisdiction of which such person is found, or resides, or transacts business, shall, upon the application of the Commission, or the administrative law judge, respectively, have jurisdiction to issue to such person an order requiring such person to appear, to testify, or to produce evidence as ordered by the Commission or the administrative law judge, respectively, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

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